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Supreme Court, U.S.
FILED
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No. __________

IN THE
Supreme Court of the United States

APPARAJAN GANESAN,
Petitioner,
v.
DOUGLAS DRETKE,
Respondent.

On Petition For Writ Of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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May 20, 2004

QUESTIONS PRESENTED

In this case, the United States Court of Appeals for the Fifth Circuit upheld the conviction of Apparajan Ganesan for solicitation of the murder of Sudha Vallabhaneni. The questions presented are:

Was the denial of a Certificate of Appealability by the 5th Circuit Court a judicial discretion error that violated Petitioner's V Amendment right to due process and XIV Amendment right to due process and equal protection?

Did various actions by the trial Judge, including the Charge to the Court to combine consideration of the two counts by the jury and refusal in include a Renunciation Defense instruction therein, violate Petitioner's V Amendment right to due process and XIV Amendment right to due process and equal protection?

Did the prosecution's misconduct exceed the bounds of acceptable argument and thereby violate Petitioner's XIV Amendment right to due process and equal protection?

Did various actions by defense counsel violate petitioner's VI Amendment right to adequate assistance of counsel?

Does the fact that no evidence of anyone ever being asked to commit the crime and the direct proof that when a Judge ruled differently on numerous close issues a different verdict resulted demonstrate the requirements of the Texas Criminal Solicitation code were not met, in violation of Petitioner's XIV Amendment right to due process and equal protection and I Amendment right to free speech?

LIST OF PARTIES

Pursuant to Supreme Court Rule 24.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Fifth Circuit.

Apparajan Ganesan was the Appellant below. Originally, Janie Cockrell was the Director of the Texas Department of Criminal Justice and the Appellee below. She has since been replaced as Director by Douglas Dretke.

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RELATED TEXAS AND FEDERAL CASES

Cases 1-6 are the instant case for the solicitation of murder charge that resulted from alleged acts stemming from the common law marriage case and its resulting bankruptcy. (Case 5 is a bail request; case 6 is this alleged offense.)

Cases 7-11 and 14 are the common law marriage cases, where 7 and 9 are a bifurcation of the common law marriage from the divorce settlement.

Cases 12, 13 are the result of USDC bifurcation of a mandamus request from the fraud action.

Case 15 is the bankruptcy case caused by actions directly associated with to the common law marriage case.

Case 16 is the Writ of Certiorari from Case 14.

	Court	**Judge**	**Case No.**
1.	390th Judicial Dist. Court, Travis County, Texas	Julie H. Kocurek	995324-A
2.	County Court III, Travis County, Texas	David Crain	492428
3.	Texas Court of Appeals, 3rd Dist., Austin	Kidd, Yeakel	03-00-125-CR 45 S.W.3d 197
4.	US District Court Western Dist. of Texas, Austin	James Nowlin, Stephen H. Capelle (Magistrate)	02-CA-00753
5.	5th Circuit Court	Edith Brown Clement, Davis, Duhe	03-50801
6.	5th Circuit Court	Jolly, Wiener, Pickering	03-51120

7.	250th Jud. Dist. Travis County, TX	John Dietz	96-14089
8.	Texas Court of Appeals, 3rd Dist., Austin	Marilyn Aboussie, Yeakel, Puryear	03-01-288CV 96 S.W.3d 345
9.	353rd District Court, Travis County, TX	Margaret Cooper	96-14089
10.	Texas Sup. Court	no published opin	02-0520
11.	US District Court Western Dist. of Texas, Austin	James Nowlin	02-CA-00614
12.	US District Court Western Dist. of Texas, Austin	James Nowlin	03-CA-00030
13.	5th Circuit Court	Dineen King, Garza, Benavides	03-50519
14.	5th Circuit Court	Dineen King, Jolly, Stewart	03-50193
15.	US Bankruptcy Ct., Western District of Texas, Austin	Frank Munroe	No. 98-10295 FRM
16.	U.S. Supreme Court, Writ of Certiorari (for 5th Cir. Case No. 03-50193), filed Mar. 24, 2004	pending conference	03-1383

Note: As is evidenced by the above, S.Ct. Case #03-1383, the instant case, and a third case, 12 and 13 above (Writ of Certiorari in preparation), share significant commonality of history. In the interests of judicial efficiency, the Court may want to consider all three together, per Supreme Court Rule 27.3 (see Appendix H).

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OPINIONS BELOW

The decisions of the United States Court of Appeals for the Fifth Circuit and Ganesan's Certificate of Appealability request to that Court are reprinted at Appendix 1A-54A. The decisions of the United States District Court for the Western District of Texas are reprinted at Appendix 1B-28B. The Report and Recommendation by the U.S. Magistrate is reprinted at Appendix 1C-24C and Ganesan's rebuttal is 25C-88C. The opinion and decision of the Texas Court of Appeals is Appendix 1D-14D (also published at 45 S.W.3d 197). Travis County trial court Charge of the Court, Verdicts and indictment is Appendix 1E-12E. The Texas Supreme Court did not publish its denial of Ganesan's petition.

JURISDICTION

The Fifth Circuit Court of Appeals refused to issue a Certificate of Appealability (COA) on Feb. 6, 2004. A timely petition for rehearing was denied on Mar, 2, 2004. This Court has jurisdiction pursuant to 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, which provides in relevant part as follows:

First Amendment - Congress shall make no law … abridging the freedom of speech….

Fifth Amendment - No person shall … be deprived of life, liberty, or property, without due process of law; ….

Sixth Amendment - In all criminal prosecutions, the accused shall enjoy the right to a … trial, by an impartial jury …; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment – Section 1. … No State … shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the provisions of the Federal Habeas Corpus statute governing Federal review of state court decisions, 28 U.S.C. § 2254 and the Texas Penal Code § 15.03, 15.04, and 15.05 (Appendix F).

STATEMENT OF THE CASE

A. Background

In September, 1996, after 18 months of cohabitation, Sudha Vallabhaneni permanently moved out of Apparajan Ganesan's residence and filed in Travis County, Texas, for a declaration of Common Law Marriage and a divorce. Ms. Vallabhaneni was represented by attorney Amy Wright.

In January 1997, Vallabhaneni successfully filed suit to freeze Ganesan's assets, blocking his ability to pay a $1M bill by claiming a business arrangement with, Meade, a company in Switzerland, was fraudulent and intended to enable him to move his assets overseas. But the product of that agreement was presented at an international conference, ISSCC, February 1997 (Appendix G), and was also recognized by a well respected trade magazine, EDN, as one of the top 100 products of 1997. But because of the blockage of payment to Meade, Ganesan eventually filed for bankruptcy (U.S. Western District, Austin Division, Case No. 98-10295-FM-7). Vallabhaneni also obtained a protection order against Ganesan.

Ganesan and Vallabhaneni held more than 150 hours of phone calls over the ensuing months, some initiated by each party, during which Ganesan unsuccessfully attempted to get his assets sufficiently unfrozen to pay Meade. Vallabhaneni taped 16 hours of those phone calls. On one 90 minute tape, near the end of the call, Vallabhaneni had a two minute snippet that sounds as if Ganesan is threatening her. In June, 1997, Ganesan was sent to county jail for 14 days for violation of the protection order.

While in county jail, Ganesan asked another inmate, Hammonds, if he knew anyone who could talk to Vallabhaneni, since the protection order prohibited Ganesan from doing so. A third prisoner, Mr. Garcia, was present during this conversation. Unbeknownst to Ganesan, Hammonds interpreted "talk to" as "kill." Although Mr. Garcia was extremely drunk upon his arrest, the conversation with Hammonds occurred 13 hours later, so Garcia could have been called as a witness to the discussion.

Subsequent to their releases, Hammonds contacted Ganesan in response to a call from Ganesan for help with construction work. Hammonds apparently assumed Ganesan was calling to follow up on the jail discussion. Hammonds contacted the Texas Rangers who taped the call. There was not one word related to Vallabhaneni on the tape (the tape was never introduced at trial by Prosecution or defense).

18 months later, Sep. 1998, Ganesan, was cohabiting with Reda Sue Prier. He was extremely frustrated with his

funds still being frozen and was now in bankruptcy court due to his failure to pay Meade. He is alleged to have asked Prier if she knew anyone who could get rid of Vallabhaneni. Prier, a few days later, play acted with Ganesan and said she had contacted an old boy friend regarding Vallabhaneni. Ganesan, having vented sufficiently in the earlier discussion with Prier, responded that any meeting she had with the old boy friend would be for a "roll in the hay."

In Nov. 1998, Ganesan and Prier had a significant disagreement. In anger Prier went to the police and reported the alleged solicitation for Vallabhaneni's murder. The next day, she attempted to burn her statement to the police, but was stopped by Ganesan's lawyer. She also refused further contact with the police, and for the next year carried on a romantic relationship with Ganesan via e-mail and letters.

Ganesan was arrested and bail was set at $2M. Ganesan remained in Travis County jail for the next 13 months. During this time, five attempts were made, all unsuccessful, to indict Ganesan on various single count charges. In Nov. 1999, one month before jury trial, he was indicted on a dual charge of solicitation of the murder of both Vallabhaneni and Wright, apparently on the theory of a greater assertion of guilt, and the case went to jury trial the following month.

B. The Criminal Trial

The two minute snippet of the 90 minute tape out of 16 hours of telephone calls taped by Vallabhaneni, the alleged solicitation of Prier, and the jail discussion with Hammonds were the primary pieces of evidence used to convict Ganesan of both counts of solicitation. Defense counsel failed to play the entire 90 minute tape. (At a subsequent trial, in July 2001 with a different trial judge, on related charges with the same evidence and the same parties, he did play the entire tape, and the verdict was not guilty, in 35 minutes of deliberation.)

No evidence of any discussion of remuneration was presented by the prosecution. Evidence was presented that Ganesan had sufficient assets for a "kill for hire." This included payment in cash (per Ganesan's Asian habit of paying with cash) of $106,000 in legal fees and about $4000 Traveler's Checks plus $2000 in cash that Ganesan had in his home since 1992 (and another $600 in cash that had been placed in his house by a friend for payment of property taxes). Ganesan's defense counsel failed to show that the $6000 had been in his possession since 1992, although such evidence was readily obtainable from American Express (Traveler's Checks have serial numbers) and the bank.

Although both the Hammonds and Prier discussions were renunciated (Hammonds by the Texas Ranger tape and Prier by the "roll in the hay" comment), the judge refused a renunciation instruction for Hammonds. Defense counsel failed to ask for one for Prier. Defense counsel also made only a minimum effort to locate Mr. Garcia, who did not testify at trial and also failed to play the Hammonds tape.

In the absence of Mr. Garcia, only Ganesan could clarify that what Hammonds claimed (he was asked to kill) was only a request to talk. Defense counsel very strongly insisted Ganesan not testify. Ganesan later realized the folly of that advice and, at the punishment phase, he went against the advice of counsel and did testify.

The Hammonds discussion was 18 months prior to the alleged Prier solicitation and was pattern behavior extraneous evidence of a solicitation of Prier. Due to its temporal remoteness and it being renunciated on tape, defense asked for a balance test vis-à-vis it's probative versus its prejudicial value. Judge refused to rule on the record, wrongly declaring it was for the jury to decide. At the July 2001 subsequent trial, the extraneous evidence was not allowed, and the verdict was not guilty

No evidence was presented that Hammonds or Prier or anyone else ever sought to find someone to commit murder.

At closing, on numerous occasions, Prosecutors told jury that a verdict of not guilty would be a death sentence for the two women. Defense objected and kept a running objection, but it took numerous times before Judge finally stopped this Prosecutorial extreme misconduct. At the July 2001 subsequent trial, a different judge stopped Prosecutors immediately and threatened to declare a mistrial. The prosecutor stopped, and the verdict was not guilty

In the Charge of the Court (Appendix E) to the jury, the Judge did not issue any order to the jury to consider the two counts separately. Paragraph VII (4E) of the Charge relates to the solicitation for murder of Amy Wright. Paragraph VIII (4E) of the Charge, which related to the solicitation for the murder of Vallabhaneni, begins with "keeping in mind the foregoing." Since Paragraph VII is part of the "forgoing," the Charge clearly and unequivocally directs the jury to consider evidence of this charge along with, not independent of, any evidence of the Wright solicitation (note: conviction on Wright was reversed by the State Appellate Court).

Ganesan was convicted on both counts, and he was sentenced to 10 years per count, to run concurrently.

C. State Post Trail Proceedings

At appeal, Ganesan was represented by the same counsel as at trial. Ganesan did not waive his right to conflict free counsel.

The first count (solicitation for murder of Wright) was overturned as having no corroborating evidence (*Ganesan v. State,* 45 S.W.3d 197). The second count, solicitation for the murder of Vallabhaneni, was upheld. The Texas Supreme Court accepted the Appellate Court ruling without comment. Ganesan filed a State 11.07 habeas petition on Feb. 21, 2002 which was denied on May 29, 2002.

D. Federal Post Trial Proceedings

Ganesan filed a Petition for a Writ of Habeas Corpus on Nov. 21, 2002 with the U.S. District Court, Western District of Texas. With the overturning of the solicitation of Wright, the linkage of the Vallabhaneni solicitation to it (linkage, by itself, is a fundamental violation of Ganesan's constitutional rights) takes on critical importance, and this was strongly discussed by Ganesan in both the US District Count and the 5th Circuit briefs. The conviction for the solicitation of the murder of Vallabhaneni was upheld.

The lack of a separation instruction and the instruction to link the two charges were not addressed by either Court.

The U.S. District Magistrate argued that the overturning of one count did not automatically negate the conviction on the second count. He also argued that since separate verdicts were entered, this implied that separate considerations were made as to guilt. However, the separate verdicts were issued because the court supplied the jury with two pieces of paper, one for each count (Appendix E, pages 9E-10E). Filling in two pieces of paper is zero evidence as to how the verdicts were reached.

Ganesan, as an incarcerated Pro Se litigant lacked access to the evidence of many of the things the Magistrate argued were missing. Ganesan had, as part of his petition, specifically requested an evidentiary hearing to obtain numerous pieces of evidence he recognized were missing.

The District Court accepted the Magistrate's Report and Recommendation and denied the Petition of Writ of Habeas Corpus on Sep. 17, 2003. Ganesan's request for a Certificate of Appealability was denied on Oct. 3, 2003. Ganesan filed for a Certificate of Appealabilty with the 5th Circuit on Oct. 30, 2003. The Certificate of Appealability (COA) was denied on Feb. 6, 2004 and the timely request for rehearing was denied Mar. 2, 2004.

SUMMARY OF ARGUMENT

The Judge's linkage of the sustained count to the overturned count and the lack of a separation instruction, the judge's refusal to give a renunciation instruction, the Judge allowing the extraneous evidence without explicit articulation as to its probative versus prejudicial value, the prosecutorial misconduct with the repeated dire unfounded assertions that a not guilty conviction would be a death warrant, numerous errors by defense counsel, no evidence of anyone ever being asked to commit the crime, the direct proof that when a Judge ruled differently on numerous close issues a different verdict resulted clearly demonstrate numerous violations of Ganesan's Constitutional right to an adequate defense and right to a fair trial under Amendments 1, 5, 6 and 14 of the United States Constitution.

ARGUMENT

A. The 5th Circuit Court abused its discretion by denying a Certificate of Appealability.

5th Circuit Court opined that Ganesan had made no showing "reasonable jurists would find the District Court's assessment of constitutional claims debatable or wrong."

But Ganesan's charge that no severance instruction was given to the jury, and in fact the jury was told to consider the two counts together was never even addressed by the USDC or by any of the respondents. Given this improper instruction to the jury, one must agree that, given proper instruction, it is easily argued that jurists would find differently.

Further, Ganesan was later charged on six other Class-A misdemeanor charges on the same evidence. On numerous aspects, the Judge at that trial ruled differently and the jury found Ganesan not guilty in less than 35 minutes of deliberations. Clearly, it is not an issue if reasonable jurists would rule differently because they did.

B. Judicial actions violated constitutional protections.

(1) Counts were linked instead of being separated

Ganesan's Constitutional rights to due process and fair trial per the 5th and 14th Amendments were decimated. The Constitution requires that each element of each count must be proved beyond a reasonable doubt. When cases are consolidated, the court must instruct the jury that evidence of one offense is not evidence of another joined offense.

State Appellate Court acquitted Ganesan of the Wright solicitation but affirmed his conviction on the Vallabhaneni solicitation. State Appellate Court noted that since the jury entered separate verdicts, they considered each count separately. That assumption is without merit because the court supplied two papers to them for the verdicts (see Appendix E, pages 9E-10E) (*Milanovich v. U.S.*, 81 S.Ct. 728).

Severance: Federal case law clearly requires an instruction to the jury to treat each count separately and prove each element of each count beyond a reasonable doubt (*U.S. v. Khubani*, 791 F.2d 260, 265; *U.S. v. Morris*, 974 F.2d 587, 588; *U.S. v. North*, 746 F.2d 627, 630; *Featherstone v. Estelle*, 948 F.2d 1497, 1504; *United States v. Lane*, 474 U.S. 438, 450 n.13 106 S.Ct. 725. **No such instruction** (see Appendix E) was given in the instant case.

Linkage: It is uncontroverted that Paragraph VIII of the jury Charge (Appendix E, page 4E), when read by attentive, reasonable, thoughtful jurors, specifically instructs them to **link** the affirmed count in Paragraph VIII to the acquitted count in Paragraph VII. Paragraph VIII of the Charge, which relates to the solicitation for the murder of Vallabhaneni, begins with "keeping in mind the foregoing." Since Paragraph VII is part of the "foregoing," the Charge clearly and unequivocally directs the jury to consider evidence of this charge along with, not independent of, any evidence of the Wright solicitation. Ganesan emphasizes that neither the Respondent in the Reply Brief nor the Magistrate in his Report and Recommendation make any reference to this important linkage.

> The effect of a presumption in a jury instruction is determined by the way in which a reasonable juror

> could have interpreted it, not by a state court's interpretation of its legal import .... The state was not thus forced to prove beyond a reasonable doubt ... every fact necessary to constitute the crime ... charged (*Sandstrom v. Montana*, 99 S.Ct. 2450, 2452).

Jurors must deliberate only as specifically instructed by the Judge. Supreme Court clearly directs the emphasis to how a juror might interpret the Judge's instruction rather than any interpretation the state gives to the entry of the result.

One month prior to trial of the instant case, prosecutors concocted a two count indictment as a greater assertion of Ganesan's guilt.

> The jury may confuse and cumulate the evidence and convict the defendant on one or both crimes, when it could not convict the defendant of either, if it would keep the evidence properly segregated (see detailed discussion in *United States v. Foutz*, 540 F.2d 733, 736-739 (1976, 4th Circuit)).
>
> Circumstances surrounding government's late addition of second count, coupled with the lack of evidence as evidenced by the reversal of that count and weakness of the evidence led to the ineluctable (unavoidable) conclusion that the government added the second count solely to buttress the single count. (*U.S. v. McCarter*, 316 F.3d 536, 538-542 (5th Circuit)).

Prosecution, failing to obtain an indictment on any one count, succeeded in doing so by making a two count charge, and then a jury instruction was given directing the jury to consider the second count bearing in mind the first count. In the absence of a severance instruction and by the positive linkage of the two counts in the jury charge, a conclusion that the jury made error with respect to count one, which was overturned on appeal, but not count two, cannot be accepted.

> Each count and the evidence pertaining to it should be considered separately and individually (*Zafiro v. U.S.*, 113 S.Ct. 933, 939, 506 U.S. 534, 542; *U.S. v. Pofahl*, 990 F.2d 1456, 1483, foot note 36).

In the absence of a severance instruction, it is substantially inferred that the jury made a sum total assessment of Ganesan and then simply entered a guilty verdict on the two pieces of paper given to them by the court. It cannot logically be inferred that, simply because the jury filed out the two pieces of paper (one with each charge on it), they weighed each count separately. Prosecution escaped its burden of proving each element separately beyond a reasonable doubt (*In Re Winship*, 90 S.Ct. 1068, 1073-1075).

(2) A Renunciation Defense instruction was not given

Ganesan alleges a substantial violation of his Constitutional rights to due process, equal protection, fair trial and an impartial jury, Amendments 5, 6, 14. It is uncontroverted that there was ample evidence to support a renunciation instruction and a statute defined renunciation defense (Texas P.C. § 15.04 applied to Hammonds's solicitation). It is uncontroverted that the Prosecution relied on a pattern behavior theory to attempt to strongly corroborate the Prier solicitation with Hammonds's testimony. It is also unmistakable from the record that the same pattern behavior theory would argue that, since Ganesan renunciated the Hammonds solicitation, he also would have renunciated the Prier solicitation.

In the established Federal case law, "a defendant is entitled to an instruction as to any recognizable defense for which there exists sufficient evidence for a reasonable jury to find in his favor" (*Mathews v. U.S.*, 108 S.Ct. 883, 485 US 58; *Stevenson v. U.S.*, 16 S.Ct. 839, 162 US 313). The emphasis is directed toward defense theories and not toward the characterization of whether the instruction is directed toward the primary evidence or the corroborative evidence.

The State Appellate Court incorrectly applied clearly established Federal case law and came to the objectively unreasonable conclusion when it opined, "[Petitioner] was on trial for soliciting Prier. Hammonds's testimony did not raise the issue whether appellant countermanded his solicitation of Prier." But the same logic would also say Hammonds's testimony did not raise the issue of solicitation of Prier. Rather, Hammonds was being used to establish **pattern behavior,** and as such his testimony just as easily implies renunciation as it does solicitation. But without a renunciation instruction, the **jury is not informed** that they can consider it as such.

Furthermore, the trial court does not have the discretion of discrediting a defense theory regardless of how feeble or contradictory the court may view it. That is for the jury to decide. It is a fundamental violation of due process when a court denies a defendant an instruction that would eliminate the strong corroboration of the main witness for the prosecution, because strong corroboration is one of the elements that must be proven under Texas law (Texas P.C. § 15.03(b). Further, since Renunciation Defense is in the Texas Penal Code § 15.04 (statutorily mandated), the Judge must include an instruction regarding it even without defense request (*State v. Fuller,* 506 A.2d 556, 199 Conn. 273):

> When legislature has created legally recognizable defense, fundamental Constitutional right of a defendant includes proper jury instructions on the elements of defense so the jury may ascertain whether state has met its burden of disproving defense beyond a reasonable doubt.

That this was not done is a clear violation of constitutional right to a fair trial. Defense is entitled to such an instruction.

C. Prosecutorial misconduct violated constitutional protections.

This case involves repeated and escalating prosecutorial misconduct all the way to closing summation and for which defense had a running objection for many minutes (*Ganesan v. State*, 45 S.W.3d 197, 205-207). State prosecutors Amy Casner and William Mange both made extremely prejudicial remarks to the jury during closing and final rebuttal. The comments said, repeatedly, that acquittal would, in effect, amount to a death warrant for the intended victims of the alleged solicitation. The trial court failed to strike those comments from the record, wrongly overruled crucial defense objections, and denied a defense motion for mistrial. The trial court's overruling of petitioner's objections permitted the remarks to be repeated. State Appellate Court and the Habeas Court agreed that the prosecutor's remarks were extreme. The efficacy of the only curative instruction by the trial court, near the end of rebuttal, was insignificant since the court had permitted those inflammatory remarks to go on and on without correction earlier (*Ganesan v. State*, 45 S.W.3d 197, 206). Ganesan's substantial Constitutional rights to due process, fair trial, equal protection under the law, the right to confront witnesses against him, and an unbiased jury were clearly violated (Constitutional Amendments 5, 6, 14).

The State Appellate Court correctly applied established Federal case law in opining that the prosecutorial conduct cannot be characterized as a mere deduction from the evidence or plea for law enforcement (*Ganesan*, page 206), and it correctly noted the reduced efficacy of the trial court's corrective instruction by permitting a majority of the remarks to go uncorrected. However, State Appellate Court then came to an objectively unreasonable conclusion that the remarks were not so manifestly improper or prejudicial under the circumstances as to warrant reversal. The objectively unreasonable characterization is inferred from the fact that the prosecutor stated, on the record, prior to his remarks, that the jury was laughing at him and expected him to dismiss the case. But then his outrageous misconduct remarks, aided by the Judge, unfairly biased the jury and blocked their ability to be rational triers of fact.

In *Donnelly* 416 U.S. at 644; 94 S.Ct. 1868, Court opined "some occurrences at trial may be clearly too prejudicial for … a curative instruction to mitigate their effects".

Floyd v. Meechum, 907 F.2d 347 comes close to the instant case:

1. Just as Sherry Gattison's credibility determined the evidence against Floyd, the credibility of Reda Sue Prier determined the evidence against Ganesan.
2. As in *Floyd*, the Appellate and Habeas Courts did not characterize the evidence as overwhelming or even strong, but substantial enough to support a conviction.
3. As in *Floyd*, the Appellate Court noted that Prosecutors' inflammatory assertion cannot be characterized as a mere deduction from the evidence or a plea for law enforcement.

4. As in *Floyd*, the prosecutors' remarks denied Ganesan his Constitutional right to confront evidence against him when Prosecutors' repeatedly told jury the alleged victims would die if Ganesan were let go.
5. As in *Floyd*, defense counsel did not have the opportunity to respond to the prosecutors' most egregious remarks at final summation, and defense did not make a tactical decision to not object to the improper comments that encouraged prosecutor to commit reversible errors.
6. As in *Floyd*, Prosecutors' remarks wrongly alleged that Ganesan's talks with Hammonds and Prier were proof beyond a reasonable doubt.

However, unlike *Floyd*, where Floyd was acquitted of the most serious charges against him, here Ganesan was still wrongly convicted on a count that had insufficient evidence and was overturned on that basis by the State Appellate Court.

This argument is further buttressed by another judge (Hon. Judge David Crain) ruling in a subsequent trial based on the same evidence, where the prosecutors tried the same remarks. Judge Crain went so far as to chastise the defense counsel for not requesting a mistrial soon enough, and the Judge said he would have granted one very early in the prosecutorial tirade. Such determinate proof is rarely available in a habeas petition (the record from this later trial has been preserved).

That the jury would have ruled otherwise, absent these remarks, comes directly from the mouth of the Prosecution. The Prosecutor stated on the record that "the jury was laughing" at him and expected him "to dismiss the case." But after his extreme allegations, jury found Ganesan guilty of two counts, one of which was reversed on appeal.

Each prosecutorial misconduct alone might not justify a new trial, but the effect of all of them does (*Floyd v. Meechum,* 907 F.2d 347). This mandates a new trial (*Menzies v. Procunier*, 743 F.2d 281, 288-289; *Sanders v. Lynaugh*, 714 F.Supp. 834, 835-839).

D. Assistance of counsel was insufficient to meet the constitutional requirements.

Ganesan's substantial Constitutional right to effective assistance of counsel under the 6th Amendment was clearly violated. Ganesan notes two particular aspects of his Petition that differ from most habeas claims of ineffective counsel:

First, Ganesan's trial counsel and appellate counsel were the same, and an appellate counsel is not going to bring "ineffective assistance of counsel" claim at appeal on himself (*Camacho v. State*, 65 S.W.3d 107, 108, 109-110; *Wheat v. U.S.,* 486 U.S. 153, 108 S.Ct. 1692; *Mickens v. Taylor*, 122 S.Ct. 1237, 535 U.S. 162; *Cuyler* 100 S.Ct. at 1718). A defendant is entitled to assistance of counsel free from conflict of interest (*Glasser v. United States*, 315 U.S. 60, 75-76, 62 S.Ct. 457, 467-468). The record shows no waiver of conflict by Ganesan.

The *Cuyler* standard (*Cuyler* 100 S.Ct. 1718) permits a defendant who raises no objection at trial (and appeal in this case) to recover upon a showing that an actual conflict of interest adversely affected counsel's performance (*Perillo v. Johnson*, 205 F.3d 775, 781; *Strickland* 104 S.Ct. 2064-2069; Cuyler 100 S.Ct. 1718). Further, *Whitting v. Burt*, 266 F.Supp.2d 640, 645-646 is a very recent opinion that if trial counsel and appellate counsel are the same, even if a colorable ineffective assistance claim is made, a writ must issue. The automatic remedy is to return the case to state court and begin the appellate process again.

The second difference Ganesan notes in how his Petition differs from most is that, subsequent to the felony conviction, Ganesan was represented by the same counsel at another jury trial based on the same evidence between the same parties, but before a different judge (Hon, Judge David Crain). In that trial, defense counsel corrected some of his alleged deficiencies, and the result was a "not guilty" verdict in less than 35 minutes of deliberation.

Ganesan alleges the following significant defense errors:

Vallabhaneni Tape: The snippets of the Vallabhaneni tape played by Prosecution during the trial were held by State Appellate Court as a "veiled threat" (*Ganesan v. State*, 45 S.W.3d 197, 204). Defense counsel erred in not playing the tape in full to put the snippets in their proper context. In the subsequent trial the same defense counsel corrected this error and played the entire tape. This put the snippet played at the felony trial in proper context. The verdict was "not guilty." This is determinate proof meeting the *Strickland* two-prong test and negates an element of strong corroboration.

The Hammonds Entrapment Tape: Hammonds's extraneous evidence testimony made a preposterous claim of a signed, sealed and delivered solicitation 18 months prior to the instant offense. However, there was no talk of remuneration, it was immediately renunciated, and it was a report by a convicted career criminal of a jailhouse conversation. This testimony was considered by State Appellate Court as crucial required "strong corroboration" of Prier's testimony. Hammonds contacted the Texas Rangers and tried to entrap Ganesan into admitting solicitation in a phone call taped by those Rangers. All they obtained was talk of an upcoming business trip to India. Hammonds's testimony on the record is "Ganesan was not even admitting to the solicitation." Defense had no reason whatsoever to not play the tape but did not do so. Prosecutor Casner said, on the record, "It was defense's job to play the tape," showing Casner's view that defense counsel did not do its job.

> If competency of retained attorney's representation is so apparent that a reasonably attentive official of the state [in this case Casner] should have been aware of and could have corrected it, state action for habeas corpus purpose is satisfied (*Fitzgerald v. Estelle*, 505 F.2d 1334).

The tape, which the state still has, demonstrates that Hammonds's contention of Ganesan "backing away" is a gross understatement; rather, it shows Ganesan was not even cognizant of Hammonds's topic. The tape should have been played, and the State still has this tape.

Renunciation Defense: Prosecutors' theory was that Ganesan engaged in solicitation of Hammonds and so he must also have engaged in the solicitation of Prier (pattern behavior theory). The defense counter theory was that Ganesan vented some nasty thoughts, at extremely difficult times, and his comments were at most hyperbole. Ganesan immediately renunciated the Hammonds solicitation (on tape), and there was ample evidence on the record to support he did the same with Prier (pattern behavior of renunciation).

Defense counsel requested a Renunciation Defense instruction on the Hammonds solicitation but this was denied. Defense counsel expected the same denial regarding renunciation of the Prier solicitation so he significantly erred by not even requesting one on the Prier solicitation. Magistrate argued that the Texas statute allows renunciation only for the criminal solicitation. Clearly any statutory limitation of a Renunciation Defense allowing it for the alleged solicitation but not for corroboration is a violation of the constitutional protection of a fair trial.

Even if we accept denial of a renunciation instruction for the corroborating Hammonds solicitation, this does not apply for the Prier solicitation. A renunciation instruction for Prier was essential because renunciation (in this case also supported by pattern behavior) is a statutory affirmative defense (Texas Penal Code § 15.04), making defense failure to request it for Prier a "reversible error."

Balance Test: Defense attorney was ineffective at appeal when he failed to argue that the trial court reached the wrong conclusion after applying Texas Rules of Evidence, Rule 403 evidence balancing test. State Appellate Court noted "Appellant does not argue that the court reached the wrong conclusion after applying the test. Instead, Appellant argues that court failed to apply the proper balance test at all" (*Ganesan v. State*, 45 S.W.3d 197, 204). From *U.S. v. Zabaneh*, 837 F.2d 1249, 1264; *U.S. v. Robinson*, 700 F.2d 205, 213; *U.S. v. Beechum*, 582 F.2d 911; *U.S. v. Carter*, 516 F.2d 431, the lack of articulation by the Judge must result in the extraneous evidence being discounted, and without this extraneous evidence there is no corroboration and no crime. At a subsequent trial, the same defense counsel successfully argued against the admission of the extraneous evidence.

Mr. Garcia of Brady, Texas, was in the same jail cell as Hammonds and Ganesan. He could have refuted claim by Hammonds of being solicited. Couple this with a playing the Hammonds failed entrapment tape, and any reasonable juror would completely discount Hammonds's testimony toward solicitation. However, counsel, believing Prosecutors had a weak case, made only a half-hearted effort to locate Mr. Garcia. Failure to make a significant effort to produce a key defense witness who could undermine an essential prosecution witness is failure to act as an effective counsel.

Counsel has a duty to make reasonable investigation (*Strickland v. Washington*, 104 S.Ct. 2052, 466 U.S. 668).

Magistrate speculated Mr. Garcia was drunk and would not have been reliable, but the alleged solicitation discussion took place past 1 am in the morning. Hammonds testified Mr. Garcia was drunk when he was arrested at 2 pm. More than 12 hours later, when the discussion took place, Mr. Garcia would have substantially sobered up, negating Magistrate. Also, magistrate's speculation is irrelevant to the fact that defense made insufficient effort to find Mr. Garcia.

Defendant's Right to Testify: Ganesan was prevented by his counsel from exercising his fundamental Constitutional right to testify per *Brown v. Artuz*, 124 F.3d 73, 76-80:

> If defense counsel refused to accept defendant's decision to testify and would not call him to the stand, counsel would have acted unethically to prevent the defendant from exercising his fundamental Constitutional right to testify.... [C]ounsel would have neglected vital professional responsibility of ensuring that the defendant's right to testify is protected and any waiver of that right is knowing and voluntarily.

Ganesan was the only person, absent Mr. Garcia, who could refute Hammonds's claim of being solicited.

Disqualification: Defense counsel failed to file a motion to disqualify the Judge during the trial and the appeal process. The Judge was in obvious discomfort from a pregnancy with twin girls (she gave birth days after the trial) and made many decisions different from those of another Judge who ruled in a subsequent jury trial. State Appellate Court noted that many of her decisions were close. Defense counsel, frustrated by her adverse rulings, kept running objections going. In order to be minimally effective as a counsel, as dictated by the Sixth Amendment, a disqualification argument was mandated at some time during the trial / appeal process.

Unless a defendant, charged with a serious offense, has counsel able to invoke the procedural and substantial safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself (*Cuyler v. Sullivan*, 100 S.Ct. 1708, 1715, 446 U.S. 335, 343).

E. The evidence was insufficient to meet the requirements of Texas law.

(1) Rational jury determination is required

Due process requires that no person be made to suffer the onus of a criminal conviction except upon sufficient proof defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense (see *Jackson v. Virginia*, 99 S.Ct. 2782). Ganesan's substantial Constitutional rights under the 14th Amendment were violated.

Herrera v. Collins, 113 S.Ct. 853, 861, 506 U.S. 390, 403:

> Sufficiency of evidence review, for purposes of habeas relief, does not focus whether trier of fact made correct guilt or innocence determination, but rather whether it made rational decision to convict or acquit.

In addition, The Supreme Court noted in *Herrera*, "The standard announced does not permit a court to make its own subjective determination of guilt or innocence." What is relevant is whether the jury made a "rational decision."

The State Appellate Court and the Habeas Court opined that Prosecutors' repeated extreme conduct, absent curative instructions and wrong overrulings (*Ganesan v. State*, 45 S.W.3d, 206), would affect the "rationale" of the jury. But they irrationally opined that this was cured by the Judge near the end of summation.

The State Appellate Court held the Hammonds evidence (temporally remote, fully renunciated, jailhouse conversation with an ex-con, with no hint of remuneration) as vital to strong corroboration as required under Texas Penal Code § 15.03(b). Another Judge in a subsequent trial between the same parties based on the same evidence in a jury trial ruled the Hammonds testimony inadmissible. Further, that Judge admonished the Prosecutors that he would declare a mistrial at the first sign of misconduct from them. This allowed the jury to remain rational and return a "not guilty" verdict.

The Supreme Court in *Pilon v. Bordenkircher*, 100 S.Ct. 7, 444 U.S. 1, vacated and remanded for applying the wrong criteria at habeas review where the lower courts (similar to the U.S. District and State Appellate Courts in this case) opined that "though this was a close case on the evidence, we believe that the case was not devoid of an evidentiary basis for Petitioner's conviction." Supreme Court ruled that the correct standard to apply in a habeas review is whether any (i.e. at least one) rational trier could find reasonable doubt in an essential element of the crime. Rational triers did so when 12 others found Ganesan not guilty on the same evidence in a related case between the same parties.

"Sufficiency of evidence is determined based upon the substantial elements of the criminal offense as defined by state law" (*Alexander v. McCotter*, 775 F.2d 595, 598). The elements of intent, engagement in specific conduct (as required by Texas Penal code § 15.03(a)), circumstances strongly corroborative of both the intent and that the other person act per the solicitation (as required by Texas Penal Code § 15.03(b)) are not demonstrated by the evidence (details in Habeas Petition, Ground 4).

In *King v. Collins*, 945 F.2d 867, 868, the 5th Circuit reversed and granted writ for reasons identical to the instant case, namely insufficient evidence.

(2) Attempt at solicitation is not a crime

In Texas, an attempt at solicitation is not a crime, per Texas Penal Code § 15.05. The relevant question is what distinguishes an attempt at solicitation from a completed solicitation.

It is uncontroverted that Ganesan was seeing his life's savings being lost in a bankruptcy brought on by the common law claims of an alien who froze his assets by claiming a business arrangement, that had been in place before she even met Ganesan, was a fraudulent attempt to get his money out of the country. Under the circumstances, it is natural to vent reprehensible thoughts. The jury clearly understood the nature of Ganesan's comments to Prier after her testimony when it laughed at the Prosecutor and expected him to dismiss the case, as the Prosecutor said on the record. In *Ganesan v. State*, 45 S.W.3d 197, 201, State Appellate Court opined:

> If, in the case before us, Prier had arranged for someone else to kill Appellant's wife and her attorney as she testified that Appellant requested and attempted to induce her to do, Prier would have been a party to the murders. Appellant's contention that Prier's testimony does not show that he committed a criminal solicitation under section § 15.03 is without merit.

However, the record reveals:

(a) Prier play acted to go along with Ganesan in his venting.

(b) Remuneration was never discussed between Prier and Ganesan.

(c) Ganesan blew off Prier's play acting with respect to her meeting a potential accomplice as a "roll in the hay."

No rational trier of facts could conclude that the above is anything but a "pissed off" Ganesan venting some nasty thoughts, as millions of people do each day. Further, Prier made no effort, by her own testimony, of any kind to find someone. Prosecutors looked for anything in the past that might "strongly corroborate" Prier's story, and all they could find was the one jail house conversation between Ganesan and Hammonds (renunciated on a tape made by Texas Rangers) 18 months earlier.

The Magistrate, in his Report, notes that under Texas law, a person commits solicitation if he requests another to engage in conduct that would make the other party a felon. *Johnson v. State*, 650 S.W.2d 784, 787 clarifies, "a person who requests another person to engage in complicitious conduct rather than perpetrate the offense, can be convicted of solicitation," and "engaged" was interpreted to means "employ" (page 787). It is uncontroverted from the record that Ganesan never so "engaged" Prier. Further, in *Johnson*, court opines that solicitation of solicitation without proof of engagement is no crime. Further, in *Johnson*, the court notes that **employment is key**. No one, and not Prier in particular, was employed by Ganesan, and this is on the record. Without employment, there is only a non-criminal solicitation.

Federal case law and the Supreme Court clarify the above. "It was incumbent upon the government to prove beyond a reasonable doubt (a) the threat was a true threat and (b) that is was knowingly and intelligently made" (*United States v. Robin*, 693 F.2d 376, 379-380 (5th Circuit). Further, in *McCravy v. State*, 642 S.W.2d 450, "An attempt to commit a preparatory offense is no offense at all," and from *Watts v. United States*, 89 S.Ct. 1399, "A true threat is a serious one, not uttered in jest, idle talk or political argument."

Ganesan notes the indictment states twice "Ganesan … with intent that murder … be committed." (Appendix E, pages 11E-12E). Ganesan understands his venting to both Hammonds and Prier could have been misinterpreted by them as solicitation, but his renunciation to both soon after those vents clearly demonstrates there was **no intent.** "Criminal purpose of intent must accompany casual nexus before conviction for crime can be had" (*King v. U.S.*, 209 F.2d 893). "Criminal intent is sine qua non of criminal responsibility" (*Rent v. U.S.*, 118 S.Ct. 1939, 524 US 184). "Existence of a mens rea is rule of rather than exception to the principles of Anglo American criminal jurisprudence" (*Smith v. People of State of California*, 80 S.Ct. 215, 361 US 147).

Ganesan's substantial Constitutional rights to freedom of speech, due process, fair trial, and equal protection of the law under the 1st, 5th, and 14th Amendments were violated.

(3) Extraneous evidence should not have been allowed

The trial court erred in admitting temporally remote (some 18 months earlier) extraneous evidence given by a career criminal, reporting a jailhouse conversation with a complete stranger, claiming the impossible allegation of Ganesan completing a solicitation without any hint of remuneration, and in the presence of a witness (who was not called to testify). This testimony took significant time and court record, and it distracted the jury from paying attention to the instant case. Ganesan's substantial Constitutional rights to due process and a fair trial under the 5th and 14th Amendments were clearly violated.

The Hammonds testimony is intended to strongly corroborate the Prier solicitation. But the Judge knew, after hearing Hammonds's testimony outside the presence of the jury, that it was completely renunciated, making any alleged solicitation of Hammonds "not a crime" in Texas.

Rule 403 authorizes exclusion of relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury by undue delay, waste of time, or needless presentation of cumulative evidence. This is discussed at length by Ganesan is his Petition and his Rebuttal to Respondent.

The jury came to its decision on the improper basis of generalizing the defendant's one earlier bad act (a renunciated one) into "bad character." They took that as raising the odds that he did the later bad acts, and handed down a preventive conviction per the prosecutors' misconduct claims. Paraphrasing *Old Chief v. U.S.,* 117 S.Ct. 644, although propensity evidence is relevant, when there is risk that a jury will convict for crimes other than those charged, or that uncertain guilt will still get a conviction, the prejudicial effect outweighs it as admissible evidence. This applies exactly to the instant case. Ganesan's conviction should be reversed and remanded for the same reason as in *Old Chief.*

In *Hafdahl v. Johnson*, 251 F.3d 528, 536, the 5th Circuit opined, "If evidence of an extraneous offense is wrongly admitted, however, habeas relief is proper only if the error is of such magnitude that it resulted in fundamental unfairness," citing *Blankenship v. Estelle*, 545 F.2d, 510, 516-517 (5th Circuit). Further, the admission of such extraneous evidence results in an "unfair" trial if, absent the extraneous evidence, the result would have been different. The State Appellate Court noted in the instant case that the Hammonds testimony of extraneous evidence was vital to the "strong corroboration" of Prier's testimony, and absent Hammonds's testimony, conviction would have been impossible (*Ganesan v. State*, 45 S.W.3d 197, 205, footnote 3).

The Hammonds evidence simply should not have been allowed, and in a subsequent trial between the same parties on related charges using the same evidence, a different Judge (Hon. Judge David Crain) did not allow this same extraneous evidence. This is determinate proof that reasonable jurists did rule differently (debate) resulting in different court verdicts.

In *Story v. Collins*, 920 F.2d 1247, 1254, 5th Circuit, citing *Enriquez v. Procunier*, 752 F.2d 111, 115 (5th Circuit):

> An extraneous evidence may be admitted into evidence without violating the due process claims, if the government makes a "strong showing that the defendant committed the offense and if the extraneous evidence is rationally connected with the offense charged.

But in the instant case, it is the extraneous evidence that is used as the strong showing, as the State Appellate Court opined. If we search for corroboration rather than an implied corroboration, we find only hyperbole and frustrated ranting, which is commonly done every day by people everywhere.

(4) Balance test was not applied correctly

Appellate Court inferred a meaning contrary to the explicit repeated remarks of the Judge. "It appears that Appellant's request for an express finding was misunderstood by the Judge to be a request for the Court to determine the probative value of the proffered evidence" (*Ganesan v. State*, 45 S.W.3d 197, 205, footnote 1).

Trial record is clear and unambiguous: (a) Court stated before the balance test the probative value of the extraneous evidence outweighed it prejudicial value. (b) Court repeatedly refused to articulate its findings after the balance test when so requested by defense counsel. (c) The trial court wrongly declared it was "for the jury to decide."

A fundamental tenet of the 14th Amendment is that a conclusion made by the Judge must be made on the record with unmistakable clarity. When the State Appellate Court says "it appears," then it is obvious that the **required** unmistakable clarity is missing.

Further, the Judge refused to make a mandatory finding. on a process that has been deemed mandatory. In *U.S. v. Zabaneh*, 837 F.2d 1249, 1251:

> Trial court's weighing of prejudice and probative value of extraneous evidence is mandatory and the probative value, prejudice value must be articulated on the record when requested by a party.

Also, that trial judge's action is contrary to clearly established Supreme Court verdict on a question of law is affirmed by *Sims v. State of Ga.*, 87 S.Ct. 639, where Court held that the trial judge's conclusion must appear from the record with unmistakable clarity.

The issue involves the extremely questionable admission of the extraneous evidence of Hammonds's testimony that State Appellate Court held was vital and without which state appellate court held conviction could not have been obtained. Unlike some habeas petitions, in this case the issue need not be resolved through speculation and conjecture. Another judge (Hon. Judge Davis Crain) ruled in a subsequent trial on the same evidence between the same parties on related charges to not allow that extraneous evidence, and he articulated his findings on the record. That jury found Ganesan "not guilty."

CONCLUSION

Numerous violations of Ganesan's constitutionally protected rights to a fair trial, due process and effective counsel occurred. Ganesan's trial was an illogical unconscionable sham. The conviction should be overturned, or at minimum a new trial should be ordered for the one remaining count.

May 20, 2004 Apparajan Ganesan, Pro Se

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
FEB -6 2004
CHARLES R. FULBRUGE III
Clerk

No. 03-51120
USDC No. A-02-CV-753-JN

APPARAJAN GANESAN,
Petitioner-Appellant,

versus

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas

ORDER:

Apparajan Ganesan, Texas prisoner # 904088, was convicted by a jury of solicitation to commit murder and was sentenced to ten years of imprisonment. Ganesan v. State, 45 So.W.3d 197, 200 (Tex. Ct. App. 2001). Ganesan requests a certificate of appealability (COA) to appeal the denial of his application for writ of habeas corpus under 28 U.S.C. § 2254. To obtain a COA, Ganesan must make a substantial showing of the denial of a constitutional right. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

The district court rejected Ganesan's claims of insufficient evidence, improper argument, automatic reversal, improperly admitted extraneous-offense evidence, failure to recuse, improper jury instruction, and ineffective assistance of counsel. As these rulings were on the merits, Ganesan must show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Ganesan has made no such showing.

Ganesan's motion for COA is DENIED.

Signed by:// E. Grady Jolly
E. GRADY JOLLY
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
MAR -2 2004
CHARLES R. FULBRUGE III
Clerk

No. 03-51120

APPARAJAN GANESAN

Petitioner-Appellant,

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent - Appellee

Appeal from the United States District Court for the
Western District of Texas, Austin

Before JOLLY, WIENER, and PICKERING, Circuit Judges.

BY THE COURT:

A member of this panel previously denied appellant's motion for certificate of appealability. The panel has considered Appellant's motion for reconsideration. IT IS ORDERED that the motion is **DENIED**.

Initialed By: JW 3/1/04 CWP 2-26-04 EGJ

Note: The following 5th Circuit Court Orders were filed in the same USDC case as the above, but were on a bail request motion, not on a challenge to the original trial court verdict.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of
Appeals Fifth Circuit
FILED
Aug -5, 2003
Charles R. Fulbruge III
Clerk

No. 03-50801
USDC No. A-02-CV-753-JN

APPARAJAN GANESAN
Petitioner-Appellant,

Versus

JANIE COCKRELL, Director, Texas Department
Of Criminal Justice, Institutional Division,
Respondentnt-Appellees.

Appeal from the United States District Court
for the Western District of Texas

Before DAVIS, DUHE, and CLEMENT, Circuit Judges.

BY THE COURT:

This court must examine the basis of its jurisdiction on its own motion if necessary. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). In this habeas corpus case, the petitioner filed a pro se notice of appeal to this court from an order of the magistrate judge denying his motion for bail. The order of the magistrate denying the bail motion is not appealable to this court. Trufant v. Autocon, Inc., 729 F.2d 308, 309 (5th Cir. 1984).

APPEAL DISMISSED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of
Appeals Fifth Circuit
FILED
Aug 19, 2003
Charles R. Fulbruge III
Clerk

No. 03-50801

APPARAJAN GANESAN
Petitioner-Appellant,

versus

JANIE COCKRELL, Director, Texas Department
Of Criminal Justice, Institutional Division,
Respondentnt-Appellees.

Appeal from the United States District Court
for the Western District of Texas
A-02-CV-753-JN

ON PETITION FOR REHEARING

Before DAVIS, DUHE, and CLEMENT, Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-51120

APPARAJAN GANESAN
Plaintiff - Appellant
v.
DOUGLAS DRETKE, Director, Texas Department of Criminal Justice, Institutional Division
Defendant - Appellee

REQUEST FOR A CERTIFICATE OF APPEALABILITY FROM AN ORDER DENYING HABEAS WRIT

Now comes petitioner Apparajan Ganesan and files the attached request for Certificate of Appealability in the above referenced case.

Apparajan Ganesan
TDCJ # 904088
Sanders Estes Unit
1100 Hwy 1807
Venus, TX 76084

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Note: For Appendix A of the Writ of Certiorari, the page numbers above and in the following Table of Authorities have been left the same as in the original COA. Also, the Attachments are NOT included since they appear in Appendix E of this Writ of Certiorari.

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4. Petitioner's Rebuttal – Page 5 of 45, Paragraph 8

REQUEST FOR A CERTIFICATE OF APPEALABILITY FROM AN ORDER DENYING HABEAS WRIT

1. Now comes Apparajan Ganesan and states as follows:
2. Issues and claims, rather than arguments, are certified by a Certificate of Appealability (C.O.A.) in Federal habeas proceedings (Koerner v. Grigas, 328 F.3d 1039, 1041).
3. From Castro v. U.S., 310 F.3d 900,

> The District Court was required to issue or deny a Certificate of Appealability after defendant filed a Notice of Appeal from denial of his motion to vacate sentence, though defendant has not moved for a C.O.A. ... A district judge may issue or deny a C.O.A. when ruling on a motion to vacate habeas petition, even though the petitioner has not moved for a C.O.A.

and from Henderson v. Cockrell, 333 F.3d 592, 593, 604

> Court cannot deny an application for Certificate of Appealability (COA) merely because it believes that the applicant will not demonstrate an entitlement to habeas relief.

4. 28 U.S.C. § 2253(C)(2) and 28 U.S.C. § 2253(C)(3) mandate that such certificate indicate issues on which petitioner makes a substantial showing of the denial of a Constitutional right. Such showing, as required to obtain a C.O.A. under the Antiterrorism and Effective Death Penalty Act (AEDPA), is met if Ganesan demonstrates his petition involves issues (a) that are debatable among reasonable jurists such that a court could resolve the issues differently or (b) that the issues are adequate enough to deserve

encouragement to proceed further (Ogan v. Cockrell, 297 F.3d 349).

5. Section 2254(d), as amended by AEDPA, provides that: An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

"Section 2254(d)(1) provides the standard of review for questions of law and mixed questions of laws and fact" (Caldwell v. Johnson, 226 F.3d 367, 372 (5th Cir., 2000)). The court may grant habeas relief under the "unreasonable application" clause "if the state court identifies the correct governing legal principle but applies it incorrectly, or expands a legal principle to an area outside the scope intended by the Supreme Court." *Id.* Furthermore, the state court's application "must be 'unreasonable' in addition to being merely 'incorrect'." *Id.* In other words, the appropriate inquiry is "whether the state court's application of clearly established Federal law is objectively unreasonable" *Id. quoting Williams v. Taylor, 529 U.S. 362, 409, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).* With respect to the "contrary to" clause of § 2254(d)(1), "a federal court may grant the writ if the state court has arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides the case differently than the Supreme Court on a set of materially indistinguishable facts." *Id.*

6. In the following, Ganesan applies the above principles to the various issues raised in his petition.

Ground 1 – Prosecutorial Misconduct

7. Unlike many appeals based on claims of prosecutorial misconduct, this case does not involve one or a few isolated brief episodes. Rather, it involves repeated and escalating prosecutorial misconduct all the way to closing summation and for which defense had a running objection for many minutes (Ganesan v. State, 45 S.W.3d 197, 205-207).

8. The State Appellate Court and the Habeas Court agreed that the prosecutor's remarks were extreme, and the trial court's overruling petitioner's objections permitted the remarks to be repeated. The efficacy of the only curative instruction by the court at the end was reduced by the court having permitted more inflammatory remarks to go uncorrected earlier (Ganesan v. State, 45 S.W.3d 197, 206). Ganesan's substantial **Constitutional rights to due process, fair trial, equal protection under the law, the right to confront witnesses against him, and an unbiased jury** were clearly violated (Constitutional Amendments 5, 6, 14).

9. The State Appellate Court correctly applied established Federal case law in opining that the prosecutorial conduct cannot be characterized as a mere deduction from the evidence or plea for law enforcement (page 206), and it correctly noted the reduced efficacy of the trial court's corrective instruction by permitting a majority of the remarks to go uncorrected. However, State Appellate Court came to an **objectively unreasonable** conclusion when it opined that the remarks were not so manifestly improper or prejudicial under the circumstances as to warrant reversal. The **objectively unreasonable** characterization is inferred from the fact that the prosecutor stated, on the record, prior to his remarks, that the jury was laughing at him and expected him

to dismiss the case. His remarks, aided by the Judge, unfairly biased the jury members and blocked their ability to be rational triers of fact, prejudicing them into finding Ganesan guilty on both counts, one of which was overturned by the State Appellate Court that reviewed the evidence in light most favorable to the verdict.

10. The State Appellate Court also came to a conclusion opposite to that of the U.S. Supreme Court which has opined "some occurrences at trial may be clearly too prejudicial for … a curative instruction to mitigate their effects" (Donnelly 416 U.S. at 644; 94 S.Ct. 1868).

11. Reasonable jurists have debated these issues, and their courts have issued different verdicts. Floyd v. Meechum, 907 F.2d 347 comes close to the instant case.

(a) Just as Sherry Gattison's credibility determined the evidence against Floyd, the credibility of Reda Sue Prier determined the evidence against Ganesan.

(b) As in *Floyd*, the Appellate and Habeas Courts did not characterize the evidence as overwhelming or even strong, but substantial enough to support a conviction.

(c) As in *Floyd*, the Appellate Court noted that Prosecutors' inflammatory assertion cannot be characterized as a mere deduction from the evidence or a plea for law enforcement.

(d) As in *Floyd*, the prosecutors' remarks denied Ganesan his Constitutional right to confront evidence against him. Prosecutors' repeatedly told jury the alleged victims would die if Ganesan were let go. This implied they had witnesses who did not testify at trial, and therefore could not be confronted by Ganesan, and they also alleged the same on appeal.

(e) As in *Floyd*, defense counsel did not have the opportunity to respond to the prosecutors' most egregious remarks at final summation, nor did defense make a tactical decision not to object to the improper comments that encouraged prosecutor to commit reversible errors.

(f) As in *Floyd*, Prosecutors' remarks wrongly alleged that Ganesan's hyperbole was proof beyond a reasonable doubt.

(g) However, unlike *Floyd*, where the jury still acquitted Floyd of the most serious charges against him, here the jury wrongly convicted Ganesan on a count that had insufficient evidence and that was eventually overturned on that basis by the State Appellate Court.

12. Prosecutors clearly attacked Ganesan's Sixth Amendment right to confront a witness against him by repeatedly implying possession of evidence that they had but somehow could not produce at trial (buttressed further by their raising issue on Appeal: see Ganesan v. State, 45 S.W.3d 197, 203-204 and Petitioner's Rebuttal, page 5 of 45, paragraph 8).

13. Ganesan deserves the same treatment as in *Floyd*: the 2nd Circuit remanded and granted a writ allowing the State to retry him within 90 days.

14. This Ground is further buttressed by another judge (Hon. Judge David Crain) ruling in a subsequent trial based on the same evidence, where the prosecutors' tried the same outrageous remarks. Judge Crain chastised the defense counsel for not requesting a mistrial soon enough, and he said he would have granted one very early in the prosecutorial tirade. Such **determinate proof** is rarely available in a habeas petition, and the record from this later trial (which has been preserved) would have been available had the Magistrate held an evidentiary hearing requested by petitioner.

15. The Prosecutors deliberately and repeatedly conveyed the false impression to the jury that they had evidence that if the

jury found Ganesan not guilty, he'll surely kill the two alleged victims.

16. The Prosecutors' remarks prejudiced Ganesan's specific right that he be tried on the evidence presented to the court (Article 6, "... to be confronted with the witnesses against him, to be informed of the nature of accusation against him, tried by an impartial jury), i.e., the state denied Ganesan the benefit of a specific provision of the Bill of Rights. Further, defense counsel could not address the Prosecutions' closing remarks since defense does not get *another* rebuttal after final prosecution closing.

17. The malicious and inflammatory prosecutorial remarks, in the context of a solicitation case (**not** a murder case), coupled with the inference one can draw from the State Appellate Court reversal of one count, indicates that the jury was crippled in its ability to be a rational trier of facts, denying Ganesan of due process. This mandates a new trial (Menzies v. Procunier, 743 F.2d 281, 288-289; Sanders v. Lynaugh, 714 F.Supp. 834, 835-839). Each prosecutorial misconduct alone might not justify a new trial, but the effect of all of them does (Floyd v. Meechum, 907 F.2d 347).

Ground 2 – Partial Reversal on a Dual Count Indictment

18. Ganesan's substantial **Constitutional rights to due process and fair trial** per the 5th and 14th Amendments were decimated.

19. Texas Penal Code § 3.03(a) states

> When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced.

Further, on page 25 of Kinkeade and McCullough Commentary to Texas Penal Code § 3.03, 2002-2003 Edition, it is stated:

> Reversal of conviction on appeal will not automatically require reversal on each other guilty verdict since they each have a separate judgment and sentence.

20. State Appellate Court relied on the above to affirm Ganesan on the Vallabhaneni solicitation while acquitting him of the Wright solicitation. Their implicit assumption was that since the jury entered separate verdicts, they considered each count separately. For Petitioner to require automatic reversal of the remaining guilty count, he must show that the jury did not consider each count separately or, alternatively, that the jury's entry of separate verdicts indicates only independent affirmation of the charges but not **independent consideration** of each count. Ganesan contends there is very strong evidence that the jury reached a single overall assessment of Ganesan's guilt and entered "guilty" on the two papers **supplied to them** (see Attachment) since each paper contained the name of only one alleged victim (Milanovich v. U.S., 81 S.Ct. 728).

21. Severance: Federal case law clearly **requires** an instruction to the jury to treat each count **separately** and prove each element of each count beyond a reasonable doubt (U.S. v. Khubani, 791 F.2d 260, 265; U.S. v. Morris, 974 F.2d 587, 588; U.S. v. North, 746 F.2d 627, 630; Featherstone v. Estelle, 948 F.2d 1497, 1504; United States v. Lane, 474 U.S. 438, 450 n.3 105 S.Ct. 725). **No such instruction** (see Attachment) was given in the instant case.

22. Linkage: It is uncontroverted that Paragraph VIII of the jury Charge (see Attachment), when read by attentive, reasonable, thoughtful jurors, specifically instructs them to link the affirmed count in Paragraph VIII to the acquitted

count in Paragraph VII. Ganesan emphasizes that neither the Respondent in the Reply Brief nor the Magistrate in his Report and Recommendation make any reference to this important linkage. Ganesan and this Court both know this means neither Respondent nor Magistrate saw any Constitutional rights, statutes, or case law allowing this linkage.

> The effect of a presumption in a jury instruction is determined by the way in which a reasonable juror could have interpreted it, not by a state court's interpretation of its legal import .... The state was not thus forced to prove beyond a reasonable doubt ... every fact necessary to constitute the crime ... charged (Sandstrom v. Montana, 99 S.Ct. 2450, 2452).

The members of the jury are not allowed to apply what they believe about the law; they must act only as specifically instructed by the Judge. Supreme Court clearly directs the emphasis to how a **juror** might interpret the Judge's instruction rather than any interpretation the state gives to the entry of the **result**, for there is no way of knowing from the **result** how the jury arrived at it. "Presumptions which act to preclude consideration of an element of the crime conflict with the presumption of innocence and the fact finding mission of the jury" (United States v. United States Gypsum Company, 98 S.Ct. 2864, 438 U.S. 422; Morissette v. United States, 72 S.Ct. 240, 342 U.S. 246). In the instant case, the conviction on count two is based on count one, without consideration of lack of strong corroboration.

23. The pertinent facts are:

> (1) During the 13 months prior to the time Ganesan was placed in the Travis County jail, prosecutors unsuccessfully attempted to obtain indictments on five single count indictments surrounding the alleged

solicitation of Hammonds. Recognizing the scant evidence and the renunciated nature of this alleged solicitation, one month prior to trial of the instant case, they concocted a two count indictment as a greater assertion of Ganesan's guilt.

> The jury may confuse and cumulate the evidence and convict the defendant on one or both crimes, when it could not convict the defendant of either, if it would keep the evidence properly segregated *(see detailed discussion in United States v. Foutz, 540 F.2d 733, 736-739 (1976, 4th Circuit)).*

But neither count had sufficient evidence on its own; but when thrown together, along with some good old fashioned outrageous pleas for law enforcement, they speculated maybe they could get a conviction helped by an inexperienced judge, under the principle "if you throw enough stuff, some will stick."

> Circumstances surrounding government's late addition of second count, coupled with the lack of evidence as evidenced by the reversal of that count and weakness of the evidence led to the ineluctable (unavoidable) conclusion that the government added the second count solely to buttress the single count. (*U.S. v. McCarter, 316 F.3d 536, 538-542 (5th Circuit)*).

(2) After the testimony of the main witness, Reda Sue Prier, was completed, the jury laughed and, according to Prosecutor Mange's statement on the record, expected him to dismiss the case. Instead of pursuing justice, Prosecutors then embarked on a path of innuendo, character assassination, and whatever else

they could get away with a new Judge, who appeared to put a stamp of approval on the Prosecutors' quest for a conviction.

(3) Prosecutorial conduct was repeatedly unlawful, outrageous, and clearly told the jury they had evidence that made them sure Ganesan was guilty, but they could not put it on the record. They continued this argument all the way to the State Appellate Court (Ganesan v. State, 45 S.W.3d 197, 203-205):

> The State cites no pertinent authority that would permit this Court to consider excluded testimony in determining the sufficiency of evidence to sustain a criminal conviction… The State did not file a cross-appeal, and the propriety of the district court's ruling is not before us. *See* Tex. Code Crim. Proc. Ann. Art. 44.01(c) (West Supp. 2001).

(4) The evidence at trial was not sufficient to support any count and, as the State Appellate Court noted, "strong corroboration" was provided by temporally remote extraneous evidence which swayed the jury from their attention to the instant case.

(5) A subsequent trial was held between the same parties, using the same evidence, before a different Judge. In that trial, the Judge refused to allow the temporally remote extraneous evidence, quenched the first sign of prosecutorial misconduct with the threat of declaring a mistrial, and defense counsel corrected his errors from the previous trial. The jury found Ganesan "not guilty" in less than 35 minutes of deliberation.

The over riding inference is

> (1) the evidence was insufficient to sustain guilt on any count, and
>
> (2) prosecutorial misconduct made the jury irrational; they affirmed the acquitted count erroneously.

24. Under the circumstances, the inference that the jury made error with respect to count one but not count two is simply wrong. This is furthered by the absence of a severance instruction and by the positive linkage of the two counts in the jury charge.

> … and charging jury that it was to consider each offense and evidence pertaining to it separately (*U.S. v. Faulkner, 17 F.3d 745, 747. 759 at page 759*).
>
> There is nothing on the record to support the inference that the jury considered, separately, the evidence as to each defendant and each count.
>
> Each count and the evidence pertaining to it should be considered separately and individually (*Zafiro v. U.S., 113 S.Ct. 933, 939, 506 U.S. 534, 542; U.S. v. Pofahl, 990 F.2d 1456, 1483, foot note 36*).
>
> The lack of acquittal on the count which the Appellate Court overthrew supports the inference that the jury did not consider separately the evidence as to each count (*U.S. v. Ellender, 947 F.2d 748, 755; U.S. v. Buckhalter, 986 F.2d 875, 877*).

There is **far greater** inference to the fact that the jury made an erroneous sum of total assessment of Ganesan and then simply entered a guilty verdict on the two pieces of paper given to them than to the conjecture that, because they filed out the two pieces of paper (one with each charge on it), they weighed each count separately but were somehow in error on only one count.

25. The essence of due process is fair jury. Prosecution escaped its burden of proving each element separately beyond a reasonable doubt (In Re Winship, 90 S.Ct. 1068, 1073-1075). At a minimum, Ganesan should get a new trial.

Ground 3 – Ineffective Assistance of Counsel

26. Ganesan's substantial **Constitutional right to effective assistance of counsel** under the 6th Amendment was clearly violated.

27. Ineffective assistance of counsel is a habeas ground invariably found in every habeas petition since most convicted individuals who are appealing believe the attorney could have done more or should have acted differently or both. Ganesan notes two particular aspects of his Petition that differ from most.

28. First, Ganesan's trial counsel and appellate counsel were one in the same, and an appellate counsel is not going to bring "ineffective assistance of counsel" claim on himself (Camacho v. State, 65 S.W.3d 107, 108, 109-110; Wheat v. U.S., 486 U.S. 153, 108 S.Ct. 1692; Mickens v. Taylor, 122 S.Ct. 1237, 535 U.S. 162; Cuyler 100 S.Ct. at 1718). Further, a criminal defendant is entitled to assistance of counsel free from conflict of interest (Glasser v. United States, 315 U.S. 60, 75-76, 62 S.Ct 457, 467-468). Such entitlement is guaranteed by the Constitutions of Texas and of the United States, and this extends both to trial and to appeal (U.S.C.A. Constitutional Amendment 6; Vernon's Ann. Texas Constitution, Article 1 § 10). Even more, such entitlement to protection is without distinction as to whether counsel is retained or appointed (Mickens v. Taylor, 122 S.Ct. 1237, 535 U.S. 162). A limitation arises in the context of a counsel with an actual or potential conflict of interest in representing the client. The trial court has an independent duty to ensure that a defendant receives a trial that is fair and

that does not contravene the Sixth Amendment aim of ensuring an effective advocate during trial and appeal. A defendant may waive the right to conflict free counsel, if the waiver is done knowingly and voluntarily (no such waiver in the instant case was provided).

29. The record reflects that appellate counsel was appointed by the same Judge who presided over jury trial. Ganesan did not question his attorney's performance during trial or during appeal. Neither the Clerk's record nor the Reporter's record reveal that the potential conflict created by brief sought to be filed by Ganesan's counsel was disclosed to Ganesan or to the trial Judge. The record does not reflect a waiver of conflict by Ganesan. Clearly, Ganesan's Sixth Amendment rights were compromised at a minimum by the continued representation by the same defense counsel through the appellate process. Defense counsel, as appellate counsel, obviously would not raise an issue that might reflect negatively on his performance at trial. Hence, a greater scrutiny of Ganesan's claims is warranted.

30. "Actual 'conflict of interest' for Sixth Amendment purposes is conflict of interest that adversely affect counsel's performance" (Mickens v. Taylor, 122 S.Ct. 1237, 535 U.S. 162). In the same, "... apply needed prophylaxis in situations where the ordinary requirements of *Strickland* are evidently inadequate to ensure vindication of defendant's Sixth Amendment right to counsel."

31. The *Cuyler* standard (Cuyler 100 S.Ct. 1718), applicable when a criminal defendant alleges that counsel's performance was impaired by conflict of interest, differs substantially from *Strickland* standard, generally applicable to Sixth Amendment ineffective counsel claims. *Strickland* requires a showing that counsel's performance was deficient and that there is a reasonable probability counsel's error changed the result of the proceeding. *Cuyler*, on the other hand, permits a defendant who raises no objection at trial

(and appeal in this case) to recover upon a showing that an actual conflict of interest adversely affected counsel's performance (Perillo v. Johnson, 205 F.3d 775, 781; Strickland 104 S.Ct. 2064-2069; Cuyler 100 S.Ct. 1718).

32. First appeal, as of right, is not adjudicated in accordance with due process of law, if the appellant does not have effective assistance of attorney (*Evitts v. Lucey, 105 S.Ct. 830, 469 U.S. 387 at Evitts 836-837*).

> In short, the promise of *Douglas* (Douglas v. California, 372 U.S. 353, 358, 83 S.Ct. 814, 817) that a criminal defendant has a right to counsel on appeal – like the promise of *Gideon* (Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 796) that a criminal defendant has a right to counsel at trial – would be a futile gesture unless it comprehended the right to the effective assistance of counsel (*see Perez v. Wainwright, 640 F.2d 596, 598 n.3 (5th Circuit); Passmore v. Estelle, 594 F.2d 115 (5th Circuit); Cantrell v. Alabama, 546 F.2d 652, 653 (5th Circuit)*).

In the instant case, trial counsel and appellate counsel were one in the same. There is an obvious conflict of interest in appellate counsel not bringing an ineffective assistance of counsel claim upon himself in the instant case, leading to a failure to perfect appeal, which is a denial of effective counsel (see Cantrell 546 F.2d at 653-654).

33. Whitting v. Burt, 266 F.Supp 2d 640, 645-646 is a very recent opinion which says that if trial counsel and appellate counsel are the same, even if a colorable ineffective assistance claim is made, a **writ must issue**. The automatic remedy is to return the case to the state court and begin the appellate process again.

34. The second difference Ganesan notes in how his Petition differs from most is that, subsequent to the felony conviction,

Ganesan was represented by the same counsel at another jury trial based on the same evidence between the same parties, but before a different judge (Hon, Judge David Crain). The transcripts of this later trial have been preserved and would have been available to the habeas court had the evidential hearing and discovery requested by Ganesan been held. In that trial, defense counsel corrected the alleged deficiencies, and the result was a "not guilty" verdict in less than 35 minutes of deliberation.

35. It is rare in habeas proceedings that a petitioner can offer such determinate proof for the second prong of the *Strickland* test, that is, a different outcome absent counsel's errors. Such determinate proof automatically necessitates a new trial.

36. Considered cumulatively, defense counsel's performance easily supports a Sixth Amendment ineffective counsel claim, and further details of other specific counsel ineffectiveness follow.

37. Vallabhaneni Tape: The snippets of the Vallabhaneni tape played by Prosecution during the trial were held by State Appellate Court as a "veiled threat" (Ganesan v. State, 45 S.W.3d 197, 204). Defense counsel erred in not playing the tape in full putting the snippets in their proper context. In a subsequent trial the same defense counsel corrected this error and played the entire tape and this put the snippet played at the felony trial in proper context. These rational triers of fact, hearing the remarks in context, cleared Ganesan. This completely negates the Appellate Court assertion of a "veiled threat" inferred from the tape (Ganesan v. State, 45 S.W. 3d 197, 204). It would be difficult to offer more determinate proof meeting the *Strickland* two-prong test.

38. The Hammonds Entrapment Tape: Hammonds's testimony of extraneous evidence made some preposterous claims (temporally remote by 18 months) of a signed, sealed and delivered solicitation. However, there was no talk of

remuneration, it was immediately renunciated, and it was a report by a convicted career criminal of a jailhouse conversation. This testimony was considered by the State Appellate Court as the crucial required "strong corroboration" of Prier's testimony. Hammonds contacted the Texas Rangers and tried to entrap Ganesan into admitting solicitation in a phone call taped by those Rangers. All they obtained was talk of an upcoming business trip to India. Hammonds's testimony on the record is "Ganesan was not even admitting to the solicitation." Obviously, if he had not made a solicitation, there would be nothing to admit, since Ganesan had no way of knowing he was being taped by the Rangers. Defense had no reason whatsoever to not play the tape. Prosecution, if justice rather than conviction had been their aim, would have played the tape. Instead, Prosecutor Casner, when confronted by Ganesan on the record, said, "It was defense's job to play the tape," clearly demonstrating Casner's conclusion that defense counsel did not do its job.

> If competency of retained attorney's representation is so apparent that a reasonably attentive official of the state [in this case Casner] should have been aware of and could have corrected it, state action for habeas corpus purpose is satisfied (Fitzgerald v. Estelle, 505 F.2d 1334).

39. The tape would have undermined the credibility of Hammonds's testimony which the State Appellate Court opined was essential for a conviction. The tape would have demonstrated that Hammonds's contention of Ganesan "backing away" was a gross understatement; rather, it would have shown Ganesan was not even cognizant of Hammonds's topic. This would have shown Hammonds to be a person whose words cannot be taken at face value at best, and to be a flat out liar at worst. Respondent still has this tape, and it

was available to the habeas court had it held the requested evidentiary hearing.

40. Renunciation Defense: Prosecutors' theory was that Ganesan engaged in solicitation of Hammonds and so he must also have engaged in the solicitation of Prier (pattern behavior theory). The obvious defense theory was that Ganesan vented some nasty thoughts, at an extremely difficult time caused by an alien's fraud, and his comments were at most hyperbole. Ganesan immediately renunciated the Hammonds solicitation, and there was ample evidence on the record to support he did the same with Prier (pattern behavior of renunciation).

41. Defense counsel became gun shy due to the erroneous rejection of a renunciation instruction request on the Hammonds solicitation and, as a consequence, failed to ask for one on the Prier solicitation. Even if we accept the unreasonable application by the state court of the Supreme Court's precedent in the denial of a renunciation instruction for the Hammonds solicitation, the same was not applicable for the Prier solicitation. The effect of a renunciation instruction for Prier would have been drastic because renunciation (in this case also supported by pattern behavior) is a statutory affirmative defense (Texas Penal Code § 15.04), and Ganesan would have been found "not guilty."

42. Remuneration for Hire: In the prosecution of this alleged "hire for kill," there was a gapping hole. Namely, neither the Prier solicitation nor the Hammonds solicitation had any inkling of remuneration or employment, which is necessary to be proven beyond a reasonable doubt.

43. Prosecutors tried to cover this gapping hole by

(1) Alleging that Ganesan was a rich person and had the wherewithal to pay.

(2) Noting that Ganesan paid his attorneys close to $106,000 in cash as attorney's fees from his home, Prosecutors tried to use Ganesan's Asian approach of

paying for things with cash against him, and State Appellate Court so noted.

(3) Attempting to portray Ganesan's **possession** of $2000 in Traveler's Checks and $4000 in cash (with cash straps from First Interstate Bank), again, as **intent** to pay. Defense counsel knew Ganesan had purchased the Traveler's Checks and made the cash withdrawal in 1992 for a family emergency (mother's death), two years before be met Vallabhaneni. Defense counsel should have called American Express and First Interstate Bank representatives to verify the timing, and Ganesan had requested this be done by the habeas court in an evidentiary hearing.

44. The resulting effect would have clearly established the bogus nature of Prosecutions' case by undermining all evidence of the element of remuneration. There was simply **no** evidence of any **intent** or offer to pay; only evidence that Ganesan had money, completely independent of any relationship with Vallabhaneni, and this is not a crime or evidence of any crime. The jury would have had to return a verdict of not guilty for lack of proof on a crucial element of the case.

> Absent competent counsel, ready and able to subject prosecution's case to the 'crucible of meaningful adversarial testing,' there can be no guarantee that the adversarial system will function properly to produce just and reliable results. (U.S. v. Cronic, 104 S.Ct. 2039, 2045, 466 U.S. 648, 656

45. Balance Test: Defense attorney was ineffective when he failed to argue that the trial court reached the wrong conclusion after applying Texas Rules of Evidence, Rule 403 evidence balancing test. State Appellate Court noted "Appellant does not argue that the court reached the wrong conclusion after applying the test. Instead, Appellant argues

that court failed to apply the proper balance test at all" (Ganesan v. State, 45 S.W.3d 197, 204). The lack of articulation by the Judge along with clearly established case law (U.S. v. Zabaneh, 837 F.2d 1249, 1264; U.S. v. Robinson, 700 F.2d 205, 213; U.S. v. Beechum, 582 F.2d 911; U.S. v. Carter, 516 F.2d 431) must result in the extraneous evidence being discounted; without this extraneous evidence there is no corroboration and no crime. Ganesan notes that at a subsequent trial, the same defense counsel argued against the admission of the extraneous evidence. It was not allowed, and the jury found Ganesan "not guilty."

> In conspiracy cases, where the liberal rules of evidence and wide latitude accorded to the prosecution may and sometimes do operate unfairly against an individual defendant, it is especially important that the defendant be given the benefit of the undivided assistance of his counsel without the court's becoming a party to encumbering that assistance (*Glasser v. 62 S.Ct. 457, 315 U.S. 60; Krestke v. U.S., 62 S.Ct. 629, 315 U.S. 827; Roth v. U.S., 62 S.Ct. 637, 315 U.S. 827*).

46. Mr. Garcia of Brady, Texas, was a key defense witness who would have completely refuted Hammonds's claim of being solicited. Couple this with playing the Hammonds failed entrapment tape, and any reasonable juror would completely discount Hammonds's testimony. The verdict would have been not guilty due to lack of corroboration. Counsel came with a preconceived notion that Prosecutors had a weak case, and therefore counsel made only a half-hearted effort to locate Mr. Garcia. Failure to make a significant effort to produce a key defense witness who would undermine an essential prosecution witness in an already weak case is failure to act as an effective counsel as

guaranteed by the Sixth Amendment, and a new trial is warranted.

> Counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary (*Strickland v. Washington, 104 S.Ct. 2052, 466 U.S. 668*).

47. Disqualification: Defense counsel, who also acted as appellate counsel, failed to file a motion to disqualify the Judge during the trial and appeal process. The Judge was in obvious discomfort from a pregnancy with twin girls (she gave birth days after the trial) and made many decisions different from those of another Judge who ruled in a subsequent jury trial. She let the Prosecutors escalate their outrageous conduct, and by her rulings and overrides of defense objections, put a judicial stamp of approval on those actions. State Appellate Court noted that many of her decisions were close. Defense counsel, frustrated by her adverse rulings, kept running objections going. It is a fact that one of the counts in front of her was reversed. Under the circumstances, in order to be minimally effective as a counsel, as dictated by the Sixth Amendment, a disqualification argument was mandated at some time during the trial / appeal process.

> Unless a defendant, charged with a serious offense, has counsel able to invoke the procedural and substantial safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself (*Cuyler v. Sullivan, 100 S.Ct. 1708, 1715, 446 U.S. 335, 343*).

The effect of a disqualification is that the proceedings would have been null and void. Ganesan should receive a new trial.

48. Defendant's Right to Testify: Ganesan was not allowed to testify by his counsel during the trial. Ganesan was the

only witness, absent Mr. Garcia, who could refute Hammonds's claim of being solicited. Ganesan recognized the incurable prejudice in the jury's mind and went against his attorney's wishes (noted on the record) and testified during the punishment phase. His testimony clearly swayed the jury from not imposing the harsh extreme sentences requested by the Prosecutors. Ganesan was prevented by his counsel from exercising his fundamental Constitutional right to testify per Brown v. Artuz, 124 F.3d 73, 76-80:

> If defense counsel refused to accept defendant's decision to testify and would not call him to the stand, counsel would have acted unethically to prevent the defendant from exercising his fundamental Constitutional right to testify. Alternatively, if defense counsel never informed the defendant of the right to testify and that the ultimate decision belongs to the defendant, counsel would have neglected vital professional responsibility of ensuring that the defendant's right to testify is protected and any waiver of that right is knowing and voluntarily.

49. Also, in Ward v. Sternes, 334 F.3d 696, citing Rock v. Arkansas, 483 U.S. 44, 52-53, and n. 10, 107 S.Ct. 2704; Rogers-Bey v. Lane 896 F.2d 279, 283; Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308; Schneck v. Bustamonte, 412 U.S. 218, 241, 93 S.Ct. 2041; Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019:

> Defendant's right to testify is personal to defendant and not capable of being waived by counsel on defendant's behalf.... Defendant's right to testify is fundamental.... Defendant's waiver of fundamental tight to testify must be knowing and intelligent to be valid.

50. In Marshall v. Hendricks, 307 F.3d 36, 114-117 (3rd Circuit), a solicitation case similar to the instant case,

> There was no evidence as to what preparation or investigation counsel performed nor as to why counsel chose not to contact defendant's proffered mitigation witness .... Record was inadequate to permit Court of Appeals to determine ... on petitioner's appeal from District Court's denial of his petition for writ of habeas corpus based on ineffective assistance of counsel, necessitating remand to District Court for evidentiary hearing.

Ground 4 – No Evidence

51. Due process requires that no person be made to suffer the onus of a criminal conviction except upon sufficient proof defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense (see Jackson v. Virginia, 99 S.Ct. 2782). Ganesan's substantial **Constitutional rights under the 14th Amendment** were violated.

52. "A properly instructed jury may occasionally convict even if it can be said that no rational trier of fact could find guilt beyond a reasonable doubt" (Jackson v. Virginia, 99 S.Ct. 2781-2788).

53. The uncontroverted facts in this case are:

> (1) State Appellate Court overturned one of the counts at trial for insufficient evidence.
>
> (2) Prosecutors indulged in outrageous conduct. Prior to this conduct, jury was, in the words of the Prosecutor, ready to acquit; after the misconduct, the jury became irrational and convicted Ganesan on both counts.
>
> (3) Prosecutors used a multi-count indictment as a strategy towards the greater assertion of guilt absent adequate evidence to sustain one count.

> (4) After the main witness, Prier, finished her testimony, jury was laughing at the Prosecutor and expected him to come and dismiss the case, and the Prosecutor said so on the record.
>
> (5) Jury charge **linked** affirmed count to overturned count.
>
> (6) **No severance instruction** was given in the jury charge to find Ganesan guilty on each count separately.
>
> (7) Jury entry of separate verdicts was driven by their being given by the court separate papers for each charge. This cannot be used as an inference of whether they considered the counts separately, but the **linkage** instruction is clear inference that they considered the counts together.

54. From Jackson v. Virginia, 99 S.Ct. 2781, 2790-2791,

> A state prisoner's claim that evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier to find guilt beyond a reasonable doubt is cognizable in a Federal habeas proceeding.

Further, from Herrera v. Collins, 113 S.Ct. 853, 861, 506 U.S. 390, 403,

> Sufficiency of evidence review, for purposes of habeas relief, does not focus whether trier of fact made correct guilt or innocence determination, but rather whether it made *rational* decision to convict or acquit. [emphasis mine]

55. In addition, The Supreme Court noted in *Herrera*, "The standard announced does not permit a court to make its own subjective determination of guilt or innocence." We adduce

from the above that what is relevant is whether the jury made a "rational decision."

56. The State Appellate Court and the Habeas Court opined that Prosecutors' repeated extreme conduct, absent curative instructions and wrong overrulings (Ganesan v. State, 45 S.W.3d, 206) would affect the "rationale" of the jury. The jury, when it was functioning rationally, laughed at the Prosecutor and expected him to dismiss the case, as noted on the record by the Prosecutor. But Prosecution's repeated extreme conduct robbed the jury of its ability to rationally review the facts. There is strong inference that the jury acted on emotion and did not act rationally to resolve conflicts in testimony, weigh the evidence, and draw reasonable conclusions.

57. It is uncontroverted that the State Appellate Court held the Hammonds evidence (temporally remote, fully renunciated, jailhouse conversation with an ex-con, with no hint of remuneration) as vital to strong corroboration as required under Texas Penal Code § 15.03(b). It is also uncontroverted that another jurist in a subsequent trial between the same parties based on the same evidence in a jury trial ruled the Hammonds testimony inadmissible. Further, that Judge admonished the Prosecutors that he would declare a mistrial at the first sign of misconduct from them. This allowed the jury to return a "not guilty" verdict in under 35 minutes. Again, the speculative or hypothetical theorizing of the evidence is not what the Supreme Court's focus is; it is on whether the jury acted as "reasonable triers."

58. Clearly, in the instant case the jury, having been robbed of its ability to act rationally, did not consider the case on an evidentiary basis. The Supreme Court in Pilon v. Bordenkircher, 100 S.Ct. 7, 444 U.S. 1, vacated and remanded for applying the wrong criteria at habeas review where the lower courts (similar to the U.S. District and State Appellate Courts in this case) opined that "though this was a

close case on the evidence, we believe that the case was not devoid of an evidentiary basis for Petitioner's conviction." However, the Supreme Court ruled that the **correct standard** to apply in a habeas review is whether **any** rational trier of fact could have found the essential elements of crime beyond a reasonable doubt. The unequivocal answer is "no," since 12 other rational triers of fact, did indeed, find Ganesan not guilty on the same evidence in a related case between the same parties.

59. "Sufficiency of evidence is determined based upon the substantial elements of the criminal offense as defined by state law" (Alexander v. McCotter, 775 F.2d 595, 598). The elements of intent, engagement in specific conduct (as required by Texas Penal code § 15.03(a)), circumstances strongly corroborative of both the intent and that the other person act per the solicitation (as required by Texas Penal Code § 15.03(b)) are not demonstrated by the evidence. Any rational trier of fact, as this jury was before the prosecutors' misconduct, would laugh at the evidence and expect the prosecution to dismiss the case.

60. In King v. Collins, 945 F.2d 867, 868, the 5th Circuit reversed and granted writ for reasons identical to the instant case, namely insufficient evidence as regard to knowledge of specific conduct and intent. The Constitution, Supreme Court precedent, Federal case law, and conduct of another jurist and jury make the case for Ganesan.

Ground 5 – Non-Criminal Solicitation of a Solicitation

61. In Texas, an attempt at solicitation is **not** a crime, per Texas Penal Code § 15.05. The relevant question is what distinguishes an attempt at solicitation from a completed solicitation.

62. It is uncontroverted that Ganesan was seeing his life's savings being lost in a bankruptcy brought on by the

common law claims of an alien (an issue that is in the hands of the 5th Circuit at this time, Ganesan v. Vallabhaneni, et al, Case No. 03-50193 and Ganesan v. U.S. Attorney, et al, Case No. 03-50519).

63. Under the circumstances, it is natural for people to return home and vent reprehensible thoughts. The jury clearly understood the nature of Ganesan's comments to Prier after her testimony when it laughed at the Prosecutor and expected him to dismiss the case, as the Prosecutor said on the record. In Ganesan v. State, 45 S.W.3d 197, 201, State Appellate Court opined,

> If, in the case before us, Prier had arranged for someone else to kill Appellant's wife and her attorney as she testified that Appellant requested and attempted to induce her to do, Prier would have been a party to the murders. Appellant's contention that Prier's testimony does not show that he committed a criminal solicitation under section § 15.03 is without merit.

The State Appellate Court correctly put the burden on Prier's testimony on the record. The record reveals:

(1) Prier offering that she had some tough uncles who could help Ganesan.

(2) Prier play acting to go along with Ganesan in his venting after he watched day after day as his life savings vanished in a bankruptcy proceeding.

(3) No remuneration ever being discussed between Prier and Ganesan in this so called "hire for kill."

(4) Ganesan blowing off Prier's play acting with respect to her meeting a potential accomplice as a "roll in the hay."

No rational trier of facts would ever conclude that the above is anything but a "pissed off" Ganesan venting some nasty thoughts. Every day, millions of people come home and indulge in reprehensible but necessary stress relief venting.

64. The jury correctly understood the testimony and laughed at the Prosecutor for bringing this frivolous case to trial. State Appellate Court erred in indulging in artificial hypothesis to force fit a mediating politically expedient verdict (let us give both parties half: we will throw out count one and uphold count two) rather than ruling from the record.

65. A scorned woman – Prier – goes to the police in a moment of anger and makes an irresponsible complaint to the police in a momentary desire to get even. She retracts it the next day, burns her police statement, and for the next year engages in a relentless pursuit through the mail to patch her relationship with Ganesan. There is absolutely no real corroboration of her testimony from anyone else.

66. Prosecutors were egged on by a crusading attorney, Amy Wright, who abetted her client, Vallabhaneni, to obtain a state court common law marriage verdict by committing repeated Federal fraud. Prosecutors, in their zeal to obtain a conviction rather than pursue justice, looked for anything in the past that might "strongly corroborate" Prier's story. The State Court system showed complete disregard for the legislative intent behind statutory specification of "strong corroboration" and Ganesan is paying the price.

67. Garber v. State, 671 S.W.2d 94 pages 98-99 clearly explains the predicate for establishing "strong corroboration" of the source and the intent. In this case, the state's corroboration did not consist of testimony as to the audio/visual observation of the offeree or any other individual." Further, no physical evidence was tendered. Under the circumstances, how is it possible to infer, as in *Garber*, "that the culpable action has sufficiently progressed towards fruition to preclude punishment for guilty thoughts?" The instant case is even simpler. Prier testified that she "play acted" to bring solace and comfort to a suffering Ganesan,

but this play acting is not a crime. What, in the record, proves statement plus strong corroboration of **anything** beyond venting of evil thoughts and that culpable action ever progressed toward **any** fruition?

68. Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827 held that the government may not "forbid or proscribe advocacy of the use of or of law violation except when such advocacy is directed toward inciting or procuring imminent lawless action and is likely to incite or produce such action" (a First Amendment right). Nothing in the record indicates that Ganesan, coming home and venting bad thoughts, incited any lawless behavior on Prier's part.

69. Johnson v. State, 650 S.W.2d 784, 787 clarifies, "a person who requests another person to engage in complicitious conduct rather than perpetrate the offense, can be convicted of solicitation," and "engaged" was interpreted to means "employ" (page 787). It is uncontroverted from the record that Ganesan never "engaged" Prier in any sense of the word. There is **nothing** in the record which proves, with strong corroboration, the element of engagement. Further, in *Johnson*, page 785, court opines that solicitation of solicitation **without** proof of engagement is **no crime** at all. In the instant case, there is no corroboration, let alone "strong" corroboration that Prier was ever asked to "employ" anyone. Prier, in her testimony, stated she was play acting and did not employ any accomplices. Further, in *Johnson*, the court notes that **employment** is **key** to making solicitation a completed act, since it is employment that would make the solicited employing person a party to commission of capital murder solicitation. No one, and not Prier in particular, was employed by Ganesan, and this is on the record. Without employment, there is only a **non-criminal** solicitation.

70. Federal case law and the Supreme Court clarify the above. "It was incumbent upon the government to prove

beyond a reasonable doubt (1) the threat was a true threat and (2) that is was knowingly and intelligently made" (United States v. Robin, 693 F.2d 376, 379-380 (5th Circuit);

71. McCravy v. State, 642 S.W.2d 450 sums this up nicely, "An attempt to commit a preparatory offense is no offense at all," and from Watts v. United States, 89 S.Ct. 1399, "A true threat is a serious one, not uttered in jest, idle talk or political argument."

72. Ganesan's substantial **Constitutional rights to freedom of speech, due process, fair trial, and equal protection of the law** under the 1st, 5th, and 14th Amendments were violated.

Ground 6 – Extraneous Evidence (Admission of Hammonds's Testimony)

73. The trial court erred in admitting temporally remote (some 18 months earlier) extraneous evidence given by a career criminal, reporting a jailhouse conversation with a complete stranger, claiming the impossible allegation of Ganesan completing a solicitation without any hint of remuneration, and in the presence of a witness (who was not called to testify). This testimony took significant time and court record, and it distracted the jury from paying attention to the instant case.

Ganesan's substantial **Constitutional rights to due process and a fair trial** under the 5th and 14th Amendments were clearly violated.

74. A jury enters court with some understanding of what proper proof should be. In a solicitation case, that may be actual injury to the alleged victim, tangible proof of planning the act such as obtaining a weapon by person solicited, proof through taped conversations, evidence of agreements of remuneration, a third party testifying to overhearing the solicitation, etc. In the instant case, the intent of the

Hammonds testimony is to strongly corroborate the Prier solicitation, for which the record is clear:

> (1) None of the alleged victims were harmed.
> (2) No determinate proof through tapes, e-mail records (Ganesan and Prier typically sent a dozen e-mails between them daily), etc. of the alleged solicitation.
> (3) No hint of remuneration whatsoever.

It is uncontroverted and stated on the record by the Prosecutor that the jury did not believe Prier's story, they were laughing at him, and they expected him to dismiss the case.

75. Virtually all evidence from Hammonds is highly prejudicial or is not material. The Judge knew, after hearing Hammonds's testimony outside the presence of the jury, that it was completely renunciated, making any alleged solicitation of Hammonds "not a crime" in Texas. She knew that any charges stemming from that conversation should be dropped by the Prosecutors (as they later were). At that point, a greater burden should be placed in admitting a non-criminal prior solicitation, since its purpose would be to prove intent and bad character. Thus, the evidence being unfairly prejudicial was a certainty. Further it is not material because it is only "character assassination;" it does not represent **any** knowledge of anything related to **any** discussions between Ganesan and Prier.

76. The principle issue is the scope of the trial Judge's discretion under Rule 403. This rule authorizes exclusion of relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury by undue delay, waste of time, or needless presentation of cumulative evidence. The above is discussed at length by Ganesan is his Petition and his Rebuttal to Respondent.

77. A re-examination of unfair prejudice follows. The term "unfair prejudice" as applied to a criminal defendant speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground **different** from proof specific to the offense charged. The jury came to its decision on the improper basis of emotion by generalizing the defendant's **one** earlier bad act (a renunciated one) into "bad character." They took that as raising the odds that he did the later bad acts, and handed down a preventive conviction per the prosecutors' misconduct claims, even if he were innocent this time. Although propensity evidence is relevant, when there is risk that a jury will convict for crimes other than those charged, or that uncertain guilt will still get a conviction, the prejudicial effect outweighs it as admissible evidence.

78. The above was paraphrased from Old Chief v. U.S., 117 S.Ct. 644, and it applies exactly to the instant case. Ganesan's conviction should be reversed and remanded for the same reason as in *Old Chief*. It is clear the State Court arrived at a conclusion opposite to that of the Supreme Court on a set of identical issues.

79. The decision in the instant case was also contrary to established Federal case law in U.S. v. Beechum, 582 F.2d 915 (evidence was disallowed because evidence was completely dissimilar, except for the common element of intent), U.S. v. Carter, 516 F.2d 431 (temporal remoteness depreciated the probity of the extrinsic evidence), and both U.S. v. Zabaneh, 837 F.2d 1249 and U.S. v. Robinson, 700 F.2d 205, 213 (time and volume of testimony of extraneous evidence led to reversal). The Hammonds evidence simply should not have been allowed. Again, in a subsequent trial between the same parties on related charges using the same evidence, a different Judge (Hon. Judge David Crain) did not allow this same extraneous evidence. This is **determinate**

proof that reasonable jurists did rule differently (debate) resulting in different court verdicts.

80. In Hafdahl v. Johnson, 251 F.3d 528, 536, the 5th Circuit opined, "If evidence of an extraneous offense is wrongly admitted, however, habeas relief is proper only if the error is of such magnitude that it resulted in fundamental unfairness," citing Blankenship v. Estelle, 545 F.2d, 510, 516-517 (5th Circuit). The State Appellate Court noted in the instant case that the Hammonds testimony of extraneous evidence was **vital** to the "strong corroboration" of Prier's testimony, and absent Hammonds's testimony, conviction would have been impossible (Ganesan v. State, 45 S.W.3d 197, 205, footnote 3).

81. In Story v. Collins, 920 F.2d 1247, 1254, 5th Circuit opined,

> An extraneous evidence may be admitted into evidence without violating the due process claims, if the government makes a "strong showing that the defendant committed the offense and if the extraneous evidence is rationally connected with the offense charged.

citing Enriquez v. Procunier, 752 F.2d 111, 115 (5th Circuit).

82. The extraneous evidence in this case is a lifelong convict reporting on a jailhouse conversation of a preposterous claim of a "signed, sealed, and delivered" solicitation, made in one conversation without any discussion of remuneration, and which Ganesan renunciated immediately. Where is the "strong showing?" Prejudice overwhelmed probity by a wide margin. The evidence should not have been allowed, and there would have been no conviction for lack of corroboration, let alone the strong corroboration required by Texas Penal Code § 15.03(b).

Ground 7 – Judicial Disqualification

83. Ganesan's substantial **Constitutional rights under the due process clause** of the Fifth and Fourteenth Amendments were violated by a Judge who was suffering from the infirmities of the final weeks of pregnancy with twins, and she repeatedly made errors (noted by the State Appellate Court and the Habeas Court) throughout the trial, which led to an adverse verdict. Further, count one at trial in front of the Judge was reversed by the Texas Appellate Court.

84. It is uncontroverted that another Judge, who presided on a subsequent jury trial based on the same evidence between the same parties on related charges, ruled differently on almost every issue (Ganesan v. State, Travis County Court, Case No. 492428, Hon. Judge David Crain presiding).

85. To the best of Petitioner's knowledge, there is no direct Supreme Court case based on this issue. However, there are well established Federal case laws and standards in this regard.

86. The first test is the habeas test of harm and the resulting prejudice (Wabasha v. Solem, 694 F.2d 155, 159). The trial Judge actively and fully participated in both the guilt / innocence and punishment phases. Her many rulings, which resulted in an adverse verdict, include:

(1) Over ruling defense objections and putting a judicial stamp of approval on outrageous prosecutorial conduct, and allowing prosecutors to repeat this conduct.

(2) Not ruling on a balance test and wrongfully ruling that it was for the jury to do so.

(3) Not providing a crucial renunciation instruction.

(4) Allowing extraneous evidence which another jurist did not permit.

(5) Not providing a severance instruction in the jury charge and wrongly instructing the jury to link the affirmed count to the acquitted count.

If this is insufficient to meet the harm and the resulting prejudice test (Ganesan received a 10 year sentence as a result of his conviction), Petitioner cannot imagine what additional harm and prejudice would be needed to obtain habeas relief.

87. The second Federal habeas standard is the one opined in Matter of Hipp, Inc., 5 F.3d 109, 111 (5th Circuit). "Disqualification of a judge is appropriate if reasonable person, knowing all relevant circumstances, would harbor doubts about the judge's impartiality." Subsequent to this trial, Ganesan asked over 100 women from all walks of life – lawyers, doctors, engineers, secretaries, correction officers, assistant wardens, nurses, etc. He has yet to find a woman who has said "Yes, under the circumstances, I'll sit in judgment of an important criminal trial." The overwhelming response is, "No, I would have let another judge take over or postponed the trial." The Judge's close calls and erroneous decisions led to a harmful verdict. Reasonable jurists would clearly debate this since they already have: another jurist, not suffering the same infirmity, ruled differently from this judge on every issue, leading to a "not guilty" verdict in a subsequent trial.

88. That the issue deserves further consideration is buttressed by the absence of any clear rule on when and in what cases a pregnant judge should start abstaining herself. In other mission critical and life threatening occupations where unerring judgment is critical (the Armed Forces, Air Traffic Control, etc.), abstention is mandated in the third trimester. Surely a jury trial with domestic content, which resulted in 10 years of deprivation of freedom, deserves the same consideration.

Ground 8 – Renunciation Defense Instruction

89. Ganesan alleges the substantial violation of his **Constitutional rights to due process, equal protection, fair trial** and an **impartial jury,** Articles 5, 6, 14. It is uncontroverted that there was ample evidence to support a renunciation instruction and a statute mandated renunciation defense (Texas P.C. § 15.04 applied to Hammonds's solicitation). It is uncontroverted that the Prosecution relied on a pattern behavior theory to attempt to strongly corroborate the Prier solicitation with the Hammonds solicitation. It is also unmistakable from the record that the same pattern behavior theory would argue that, if Ganesan renunciated the Hammonds solicitation, he either (1) committed no crime under Texas law which requires a corroborative element, or (2) he also would have renunciated the Prier solicitation, or (3) both.

90. In the established Federal case law, a defendant is entitled to an instruction as to any recognizable defense for which there exists sufficient evidence for a reasonable jury to find in his favor (Mathews v. U.S., 108 S.Ct. 883, 485 US 58; Stevenson v. U.S., 16 S.Ct. 839, 162 US 313).

91. The key fact to remember is that the emphasis is directed toward **defense theories** and not toward the characterization of whether the instruction is directed toward the primary evidence or the corroborative evidence.

92. The State Appellate Court **incorrectly applied** clearly established Federal case law and came to the objectively unreasonable conclusion when it opined, "[Petitioner] was on trial for soliciting Prier. Hammonds's testimony did not raise the issue whether appellant countermanded his solicitation of Prier." But the same logic would also say Hammonds's testimony did **not raise** the issue of solicitation of Prier. Rather, Hammonds was being used to establish **pattern behavior**, and as such his testimony just as easily implies renunciation as it does solicitation. But without a

renunciation instruction, the jury is **not informed** that they can consider it as such.

93. Furthermore, the trial court has no discretion to discredit a defense theory regardless of how feeble or contradictory the court may view it. That is for the jury to decide. The operative issue is simple: "Was there enough evidence to justify the request?" It is a fundamental violation of due process when a court denies a defendant an instruction that would eliminate the **strong** corroboration of the main witness for the prosecution, because **strong** corroboration is one of the elements that **must** be proven under Texas law (Texas P.C. § 15.03(b). Defense is **entitled** to an instruction that counters such provability.

94. The decision was clearly contrary to the Supreme Court decision (Cabana v. Bullock, 106 S.Ct. 689, 474 U.S. 377) that clearly states,

> Defendant charged with a serious crime has the right to have a jury determine his guilt or innocence, and a jury's verdict cannot stand if the instruction provided the jury do not require it to find each element of crime under proper standard of proof.

Further, this decision was clearly contrary to Francis v. Franklin 105 S.Ct. 1965, 471 U.S. 307 where Supreme Court held,

> Due process clause on the 14th Amendment protects accused against conviction except upon proof beyond a reasonable doubt on every fact necessary to constitute crime with which he is charged; forgoing Constitutional principle prohibits states from using evidentiary presumption in a jury charge that has the effect of relieving the state of its burden of persuasion beyond reasonable doubt of every essential element of the crime.

95. The evidentiary presumption was on the Hammonds testimony as "corroborative." Prosecution was allowed to use marginal, temporally remote, extraneous evidence for the purposes of **strong** corroboration (Ganesan v. State, 45 S.W.3d 197, 205). But **defense was denied** a renunciation defense instruction on a defense theory, raised by the same evidence (Ganesan v. State, 45 S.W.3d 197, 205) that went toward the negation of that corroboration. "Failure to give such an instruction is a reversible error" (United States v. Polizzi, 801 F.2d 1543, 1549; United States v. Coin, 753 F.2d 1510, 1511). Further, Texas PC § 15.04 statutorily spells out a renunciation defense.

> When legislature has created legally recognizable defense, fundamental Constitutional right of a defendant includes proper jury instructions on the elements of defense so the jury may ascertain whether state has met its burden of **disproving defense beyond a reasonable doubt** [emphasis mine] *(State v. Fuller, 506 A.2d 556, 199 Conn. 273).*

The denial is an egregious violation of due process and equal protection of the laws per the Sixth and Fourteenth Amendments to the Constitution. It is an unreasonable and incorrect application of the Supreme Court rulings.

Ground 9 – Explicit Articulation

96. Appellate Court inferred a meaning against the explicit repeated remarks of the Judge, "It appears that Appellant's request for an express finding was misunderstood by the Judge to be a request for the Court to determine the probative value of the proffered evidence" (Ganesan v. State 45 S.W.3d 197, 205, footnote 1).

97. The Habeas Court compounded the problem by parroting the State Appellate Court's finding and not making an

independent determination. The trial record is clear and unambiguous: (a) Court stated **before** the balance test the probative value of the extraneous evidence outweighed it prejudicial value. (b) The trial court **repeatedly refused** to articulate its findings after the balance test when so requested by defense counsel. (c) The trial court **wrongly** decided it was "for the jury to decide."

98. The State Appellate Court's inference is **not supported** by the record. Ganesan makes a substantial showing of the violation of his **Constitutional right to due process, fair trial, and equal protection** under the 14th Amendment. It is axiomatic that a fundamental tenet of the 14th Amendment is that a conclusion made by the Judge **must** be made on the record with unmistakable clarity. When the State Appellate Court says "it appears," then it is **obvious** that the **required** *unmistakable clarity* is missing.

99. Further, the refusal of the Judge to make a finding assumes discretion on a process that has been deemed mandatory and other jurists have held so. For example, in U.S. v. Zabaneh, 837 F.2d 1249, 1251,

> Trial court's weighing of prejudice and probative value of extraneous evidence is mandatory and the probative value, prejudice value must be articulated on the record when requested by a party.

That trial judge's action is objectively unreasonable in light of clearly established Federal law is articulated by the 5th Circuit in U.S. v. Robinson, 700 F.2d 205, 213; U.S. v. Beechum, 582 F.2d 911; U.S. v. Zabaneh, 837 F.2d 1249, 1264. That trial judge's action is contrary to clearly established Supreme Court verdict on a question of law is affirmed by Sims v. State of Ga., 87 S.Ct. 639, where Court held that the trial judge's conclusion **must** appear from the record with unmistakable clarity.

100. The issue involves the extremely questionable admission of the extraneous evidence of Hammonds's testimony that State Appellate Court held was **vital** and without which conviction could **not** have been obtained. Unlike some habeas petitions, in this case the issue need not be resolved through speculation and conjecture. Another judge (Hon. Judge Davis Crain) ruled in a subsequent trial on the same evidence between the same parties on related charges. He simply *did not allow the extraneous evidence and he articulated his findings on the record.* That jury found Ganesan not guilty in 35 minutes.

Relief Requested

101. Implicit in a Habeas proceeding is the determination of the fairness of a state court proceeding. Ganesan has shown his trial fails to meet the minimum Constitutional standard of free speech, due process and fair trial, and right to effective counsel (Articles 1, 5, 6 and 14) under the "cumulative error doctrine." Therefore, Ganesan requests a Certificate of Appealability be issued on all his Grounds.

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Respectfully Submitted,

Signed by:// Apparajan Ganesan
Apparajan Ganesan, Pro Se
TDC 904088
Sanders Estes Unit
1100 Hwy 1807
Venus, TX 76084

CERTIFICATE OF SERVICE

I believe under penalty of perjury that the foregoing is true and correct. A copy of the above was placed in the United States Postal system on the 8th day of October, 2003 for the recipients listed below.

Signed by:// Apparajan Ganesan
Apparajan Ganesan
TDC 904088
Sanders Estes Unit
1100 Hwy 1807
Venus, TX 76084

Recipients:

Office of the Clerk
5th Circuit, U.S. Court of Appeals
600 Camp St.
New Orleans, LA 70130

Mr. James R. Smith
Asst. Attorney General
PO Box 12548
Austin, TX 78711-2548

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
AUSTIN DIVISION
2002 DE-2 PM 4:24
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN §
Petitioner §
VS. § **Case No.**
§ **A-02-CA-753-JN**
JANIE COCKRELL[1] §
Respondent

ORDER

Before the Court is Petitioner's application for writ of habeas corpus under 28 U.S.C. § 2254. Petitioner has paid the filing fee of $5.00.

Service on Respondent

The Clerk of the Court shall send Michael Bozarth, Division Chief, Office of the Attorney General, Habeas Corpus Division, (Mail Code 066), P. O. Box 12548, Austin, Texas

---

[1] Petitioner named "Jamie" Cockrell as the respondent. Respondent's name is "Janie" and will be reflected as such in the record.

78711-2548, a copy of Petitioner's application for habeas corpus relief and a copy of this Order by certified mail, return receipt requested.

It is **ORDERED** that Janie Cockrell Director of TDJC-ID, as Respondent, is hereby required to file an answer to such application or otherwise plead as provided by Rule 12 of the Federal Rules of Civil Procedure within twenty (20) days after receipt of a copy of Petitioner's application. Respondent's answer shall comply with Rule 5 of the Federal Rules Governing Section 2254 Cases. At the time of filing an answer, Respondent shall serve Petitioner with a copy thereof in accordance with Rule 5(b) of the Federal Rules of Civil Procedure and shall file with the Clerk a certificate showing such service.

State Court Records

It is ORDERED that Respondent shall provide the Court with the relevant state court records within thirty (30) days after the filing of Respondent's answer.

Duty to Inform Court of Change of Address.

Petitioner is further **ORDERED** to immediately notify the Clerk of the Court and Respondent's counsel in writing of any change of address. If Respondent is not represented by counsel, or if Petitioner does not yet know the identity of said counsel, then Petitioner should notify Respondent directly. Petitioner shall send a "Notice to the Court of Change of Address" to the Clerk's Office for filing in this case which provides the new address and the effective date of the change of address, and Petitioner is not to include any motions or other matters in this notice. Failure by Petitioner to immediately notify the Clerk and Respondent or Respondent's counsel of any change in Petitioner's mailing address will be interpreted by the

Court as a failure to prosecute and will constitute grounds for dismissal of this case.

Duty to Serve Opposing Counsel

Petitioner is **ORDERED**, as required by the Federal Rules of Civil Procedure and by the Local Rules of the Western District of Texas, to send a copy of all pleadings, motions, and other documents Petitioner submits to the Clerk of the Court for filing in this case, to Respondent, or, after an attorney has made an appearance for Respondent, to Respondent's counsel. All pleadings, motions or other documents are to contain a "certificate of service" which shows the date and method (e. g., hand delivery, certified mail, or regular mail), by which Petitioner sent a copy of that pleading to Respondent or Respondent's counsel. Once an attorney has made an appearance for Respondent, by filing a pleading, motion or other document on behalf of Respondent, Petitioner must send all future motions, pleadings, or other documents which he files in the case to Respondent's attorney and not to Respondent.

Duty to Respond to Opposing Motions within Eleven Calendar Days

Petitioner is **ORDERED** to read the Local Rules for the Western District of Texas and comply with said rules. Petitioner is warned that Local Rule CV-7(d) requires a party opposing a motion to file a response within eleven (11) calendar days after a copy of that motion is served upon Petitioner. A failure by Petitioner to timely respond may be construed by the Court as a lack of opposition to the motion and may result in the Court granting the motion. Petitioner is warned that, under Federal Rule of Civil Procedure 8(d), averments in a pleading or motion to which a responsive pleading is required are admitted when not denied in the responsive pleading. Thus, if Respondent files a motion which Petitioner opposes, Petitioner should file a timely response, and a failure to do so may result in the motion being granted.

SIGNED this the 2nd day of December 2002.

Signed\\ Stephen H. Capelle
STEPHEN H. CAPELLE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 JA-7 AM 7:57
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN, §
TDCJ-ID #904088, §
Petitioner, §
§
VS. § CAUSE No.
§ A-02-CA-753-JN
JANIE COCKRELL, § (Honorable Stephen H.
DIRECTOR, TEXAS § Capelle)
DEPARTMENT OF §
CRIMINAL JUSTICE, §
INSTITUTIONAL DIVISION, §
Respondent. §

ORDER

Came on this day to be considered Respondent Cockrell's *First Motion for Extension of Time with Brief in Support*, and this court, after considering the pleadings of the parties filed herein, is of the opinion that the following order should issue:

It is hereby ORDERED, ADJUDGED and DECREED that Respondent's motion be **GRANTED**, and that Respondent's time for placing an answer or responsive pleading in the mail for filing should be and hereby is extended up to and including the **23rd day of January, 2003.**

SIGNED on this the 6th day of January, 2003

Signed// Stephen H. Capelle
JUDGE PRESIDING

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 JA 24 PM 3:57
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN,	§	
TDCJ-ID #904088,	§	
Petitioner,	§	
	§	
VS.	§	CAUSE No.
	§	A-02-CA-753-JN
JANIE COCKRELL,	§	(Honorable Stephen H.
DIRECTOR, TEXAS	§	Capelle)
DEPARTMENT OF	§	
CRIMINAL JUSTICE,	§	
INSTITUTIONAL DIVISION,	§	
Respondent.	§	

ORDER

Came on this day to be considered *Respondent Cockrell's Second Motion for Extension of Time with Brief in Support*, and this court, after considering the pleadings of the parties filed herein, is of the opinion that the following order should issue:

It is hereby ORDERED, ADJUDGED and DECREED that Respondent's motion be **GRANTED**, and that Respondent's time for placing an answer or responsive pleading in the mail for filing should be and hereby is extended up to and including the **24th day of February, 2003**.

SIGNED on this the 24th day of January 2003.

Signed// Stephen H. Capelle
JUDGE PRESIDING

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 FE 28 PM 3:15
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN,	§	
TDCJ-ID #904088,	§	
Petitioner,	§	
	§	
VS.	§	CAUSE No.
	§	A-02-CA-753-JN
JANIE COCKRELL,	§	(Honorable Stephen H.
DIRECTOR, TEXAS	§	Capelle)
DEPARTMENT OF	§	
CRIMINAL JUSTICE,	§	
INSTITUTIONAL DIVISION,	§	
Respondent.	§	

ORDER

Came on this day to be considered *Respondent Cockrell's Third Motion for Extension of Time,* and this court, after considering the pleadings of the parties filed herein, is of the opinion that the following order should issue:

It is hereby ORDERED, ADJUDGED and DECREED that Respondent's motion be **GRANTED**, and that Respondent's time for filing a responsive pleading in this cause should be and hereby is extended up to and including the 3rd day of March, 2003.

SIGNED on this the 28th day of February, 2003.

Signed// Stephen H. Capelle
JUDGE PRESIDING

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 MR 12 PM 3:27
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN	§	
	§	
V.	§	**A-02-CA-753-JN**
	§	
JANIE COCKRELL	§	

ORDER GRANTING MOTION TO EXTEND TIME

Before the Court is Petitioner's Motion to Extend Time. Petitioner requests additional time to respond to Respondent's answer. After consideration of the motion, the Court is of the opinion that it should be granted.

It is therefore **ORDERED** that the Motion to Extend Time, filed by Petitioner on March 10, 2003, is **GRANTED.**

It is **FURTHER ORDERED** that Petitioner shall file his response on or before April 7, 2003.

SIGNED this 12th day of March, 2003.

Signed\\ Stephen H. Capelle
STEPHEN H. CAPELLE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 AP-4 PM 4:21
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN	§	
	§	
V.	§	**A-02-CA-753-JN**
	§	
JANIE COCKRELL	§	

ORDER GRANTING MOTION TO EXTEND TIME

Before the Court is Petitioner's Motion to Extend Time. Petitioner requests additional time to respond to Respondent's answer. After consideration of the motion, the Court is of the opinion that it should be granted.

It is therefore **ORDERED** that the Motion to Extend Time, filed by Petitioner on April 3, 2003, is **GRANTED**.

It is FURTHER ORDERED that Petitioner shall file his response on or before April 21, 2003.

SIGNED this 4th day of April, 2003.

Signed\\ unreadable
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 JN 12 PM 1:00
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN	§	
	§	
V.	§	**A-02-CA-753-JN**
	§	
JANIE COCKRELL	§	

ORDER

Before the Court is Petitioner's Motion for Default Judgment. Petitioner argues he is entitled to a default judgment because Respondent has not filed a response to his motion for summary judgment. After consideration of the motion, the Court is of the opinion it is completely without merit and should be denied.

It is therefore **ORDERED** that the Motion for Default Judgment, filed by Petitioner on June 10, 2003, is **DENIED**.

SIGNED this 12th day of June, 2003.

Signed\\ Stephen H. Capelle

16B

STEPHEN H. CAPELLE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 JL-2 AM 11:49
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN	§	
	§	
V.	§	**A-02-CA-753-JN**
	§	
JANIE COCKRELL	§	

ORDER

Before the Court is Petitioner's Request for Bail. After consideration of the motion, the Court is of the opinion it should be denied.

It is therefore **ORDERED** that the Request for Bail, filed by Petitioner on June 27, 2003, is **DENIED**.

SIGNED this 2nd day of July, 2003.

Signed\\ Stephen H. Capelle
STEPHEN H. CAPELLE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 JL 17 PM 4:49
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN,	§	
Petitioner,	§	
	§	
-vs-	§	**Case No.**
	§	**A-02-CA-753-JN**
JANIE COCKRELL,	§	
Respondent,	§	

ORDER

BE IT REMEMBERED on this the 17th day of July 2003, the Court reviewed the file in the above-styled cause and specifically the "Request for a Certificate of Probable Cause/Appealability from an Order Denying Bail" [#25] filed July 14, 2003, whereby the petitioner is attempting to appeal the Magistrate Court's order of July 2, 2003, denying the petitioner's request for bail. To the extent it is necessary the Court considers Petitioner's request.

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") § 102, codified at 28 U.S.C. § 2253(c)(2), the Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right," This standard "includes showing that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 120 S.Ct. 1595,1603-04 (2000) (internal quotations and citations omitted).

Petitioner's request for bail was frivolous and was rightly denied. Accordingly, the Court concludes no issues presented in this case merit the issuance of a certificate of appealability. Accordingly,

IT IS ORDERED that the petitioner's request for certificate of appealability is DENIED. SIGNED this the 17th day of July 2003.

Signed\\ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 AU 19 PM 3:26
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN	§	
	§	
-vs-	§	**CIVIL NO.**
	§	**A-02-CA-753-JN**
JANIE COCKRELL	§	

ORDER

Before the Court is Plaintiff s Motion to Extend Time to Respond (Clerk's Doe. No. 29) filed 4 August 2003. The Court hereby GRANTS the Motion; Plaintiff shall FILE objections, if at all, no later than 15 September 2003. All other pending motions are hereby DENIED.

It is so ordered.

SIGNED AND ENTERED this the 19th day of August, 2003.

Signed\\ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 SP 17 PM 5:42
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN	§	
	§	
-vs-	§	**CIVIL NO.**
	§	**A-02-CA-753-JN**
JANIE COCKRELL	§	

ORDER

Before the Court is the above entitled cause of action. This cause was referred to the United States Magistrate Judge for findings and recommendations pursuant to 28 U. S.C. § 636(b) and Rule 1 of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. The Magistrate Judge filed his Report and Recommendation on 30 July 2003. Plaintiff filed Objections to the Report and Recommendation on 15 September 2003.

The Magistrate Judge recommended that the Court deny Petitioner's application for writ of habeas corpus and his Motion for Summary Judgment. In light of the Plaintiffs Objections, the Court has undertaken a de novo review of the entire case file in this cause and finds that the

Recommendation filed by the Magistrate Judge should be approved and accepted for the reasons stated therein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States Magistrate Judge's Report and Recommendation filed in this cause is ACCEPTED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Petitioner's application for writ of habeas corpus and Petitioner's Motion for Summary Judgment are hereby DENIED.

IT IS FURTHER ORDERED that this case is CLOSED and that all pending motions are DISMISSED AS MOOT.

SIGNED AND ENTERED this the 17th day of September, 2003.

Signed\\ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 SP 17 PM 5:42
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN	§	
	§	
-vs-	§	**CIVIL NO.**
	§	**A-02-CA-753-JN**
JANIE COCKRELL	§	

ORDER

Before the Court is the above entitled cause of action. Upon review of the entire case file and this Court's Order of Denial, the Court enters the following Final Judgment in this cause pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED, ADJUDGED, AND DECREED that Petitioner's application for writ of habeas corpus and Motion for Summary Judgment are hereby DENIED.

SIGNED AND ENTERED this the 17th day of September, 2003.

Signed\\ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 SP 30 PM 4:13
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN,	§	
Petitioner.	§	
	§	
-vs-	§	**Case No.**
	§	**A-02-CA-753-JN**
JANIE COCKRELL,	§	
Respondent,	§	

ORDER

BE IT REMEMBERED on this the 30th day of September 2003, the Court reviewed the file in the above-styled cause and specifically the "Notice of Appeal" [#36] filed September 25, 2003, whereby the petitioner is attempting to appeal this Court's order of September 17, 2003, denying the petitioner's application for habeas corpus relief filed under 28 U.S.C. § 2254. The Court construes the notice as a request for certificate of appealability. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") § 102, codified at 28 U.S.C. § 2253(c)(2), the Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." This standard "includes showing that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 120 S.Ct. 1595,1603-04 (2000) (internal quotations and citations omitted).

The petitioner failed to identify any particular issues for appeal. Furthermore, for the reasons stated in the Court's order dated September 17, 2003, denying the petitioner's application for habeas corpus relief filed under 28 U.S.C. § 2254, which are incorporated by reference herein, the Court concludes no issues presented in this case merit the issuance of a certificate of appealability. Accordingly,

IT IS ORDERED that the petitioner's request for certificate of appealability is DENIED.

SIGNED this 30th day of September 2003.

Signed\\ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 OC-3 PM 2:03
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN,	§	
Petitioner.	§	
	§	
-vs-	§	**Case No.**
	§	**A-02-CA-753-JN**
JANIE COCKRELL,	§	
Respondent,	§	

ORDER

BE IT REMEMBERED on this the 3 rd day of October 2003, the Court reviewed the file in the above-styled cause and specifically the "Request for a Certificate of Appealability from an Order Denying Habeas Writ" [#38] filed October 1, 2003, whereby the petitioner is attempting to appeal this Court's order of September 17, 2003, denying the petitioner's application for habeas " corpus relief filed under 28 U.S.C. § 2254. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") § 102, codified at 28 U.S.C. § 2253(c)(2), the Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right" This standard "includes showing that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel,120___S.Ct.1595,1603-04 (2000) (internal quotations and citations omitted).

The petitioner identifies as issues for appeal: (1) whether there was prosecutorial misconduct in his case; (2) whether the petitioner's rights to due process and fair trial were violated with regard to a dual count indictment; (3) whether he received ineffective assistance of counsel (4) whether the evidence was sufficient to support his conviction; (5) whether petitioner could be found guilty of an attempt at solicitation; (6) whether the trial court erred in admitting extraneous evidence; (7) whether the presiding judge in his trial should have been disqualified as a result of her pregnancy; (8) whether he was entitled to a renunciation defense instruction; and (9) whether the appellate court inferred a meaning against the explicit repeated remarks of the trial judge. For the reasons stated in the Court's order dated September 17, 2003, denying the petitioner's application for habeas corpus relief filed under 28 U.S.C. § 2254, which are incorporated by reference herein, the Court concludes no issues presented in this case merit the issuance of a certificate of appealability. Accordingly,

IT IS ORDERED that the petitioner's request for certificate of appealability is DENIED.

SIGNED this 3rd day of October 2003.

Signed\\ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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APPARAJAN GANESAN, §
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Petitioner, §
§
VS. §
§ A-02-CA-753 JN
JANIE COCKRELL, §
Director, Texas Department §
Of Criminal Justice, §
Institutional Division, §
§
Respondent. §

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

To: THE HONORABLE JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

The Magistrate Court submits this Report and Recommendation to the District Court pursuant to 28 U.S.C. § 636(b) and Rule 1(e) of Appendix C of the Local Court Rules of the United States District Court for the Western

District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges.

Before the Court are Petitioner's Petition for a Writ of Habeas Corpus (Clerk's Dkt. #1), Petitioner's Rebuttal (Clerk's Dkt. #3), Respondent Cockrell's Answer with Brief in Support (Clerk's Dkt. #13), Petitioner's Rebuttal to Respondent Cockrell [sic] Answer (Clerk's Dkt. #18) and Petitioner's Motion for Summary Judgment (Clerk's Dkt. #19). For the reasons set forth below, Petitioner's application for writ of habeas corpus and motion for summary judgment should be denied.

I. Procedural History

Petitioner Apparajan Ganesan ("Ganesan") was convicted by a jury of two counts of solicitation of murder. Punishment was assessed at ten years confinement on each count, to run concurrently. Petitioner appealed his conviction. The court of appeals reversed his conviction on one count, finding the testimony against Ganesan insufficiently corroborated under Texas law. The court affirmed the conviction on the second count. *Ganesan v. State*, 45 S.W.3d 197 (Tex. App.-Austin 2001, pet. ref'd). Ganesan also sought state post-conviction relief in an application for writ of habeas corpus. The Texas Court of Criminal Appeals denied habeas relief without written order. *Ex parte Ganesan*, No. 52,253-01 (Tex. Crim. App. May 29, 2002). Petitioner then filed this action in federal court.

II. Standard of Review

The standard of review in federal habeas cases is governed by the Antiterrorism and Effective Death Penalty Act of 1996. S88 ANTITERRORISM AND EFFECTIVE

DEATH PENALTYACT, Pub. L. 104-132, 110 Stat, 1214 (1996) ("AEDPA"). Under the AEDPA, a habeas petitioner may not obtain relief with respect to any claim adjudicated on the merits in a state court proceeding unless he shows the prior adjudication: (1) resulted in a decision contrary to, or an unreasonable application of, clearly established federal law; or (2) resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court. 28 U.S.C. § 2254(d). A state court decision is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court of the United States] on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413,120 S. Ct. 1495, 1523 (2000). An unreasonable application of clearly established federal law is one in which "the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.*, 120 S.Ct. at 1523. A state court decision is entitled to deference unless it "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Hill v. *Johnson,* 210 F.3d 481, 485 (5th Cir. 2000), *cert. denied,* 121 S. Ct 2001 (2001). A presumption of correctness attaches to factual determinations made by a state court. 28 U.S.C. § 2254(e)(1). A habeas petitioner must rebut this presumption by clear and convincing evidence. *Id.; Ladd v. Cockrell,* 311 F.3d 349, 352 (5th Cir. 2002).

III. Issues Raised

Ganesan raises seven issues in nine grounds for relief. He contends: (1) the evidence was insufficient to support his conviction; (2) the prosecutor made improper remarks during closing argument; (3) the appellate court's reversal on one count of a two-count indictment mandated a new trial on the second count; (4) the trial court erred in admitting extraneous offense testimony; (5) the trial judge should have recused herself; (6) the jury instructions were improper; and (7) he received ineffective assistance of counsel.

A Sufficiency of the Evidence

Ganesan first claims his conviction is not supported by sufficient evidence. He asserts the state failed to provide corroborating evidence of the testimony of the person he allegedly solicited and that the evidence at most proved only non-criminal solicitation of solicitation.

1. Standard of Review

Federal habeas review of a claim based on the sufficiency of the evidence is extremely limited. A federal court may not disturb a conviction in a state criminal proceeding unless no rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Gibson v. Co!lins,* 947 F.2d 780,781 (5th Cir.1991). The evidence must be viewed in the light most favorable to the verdict. *Jackson,* 99 S.Ct. at 2789; *Gibson,* 947 F.2d at 781. This standard of review applies in both direct and circumstantial evidence cases. *Schrader v. Whifley*, 904 F.2d 282, 287 (5th Cir. 1990).

2. Elements of the Offense

Federal courts are bound by state statutes and case law in determining the elements of an offense. *Foy v. Donnelly*, 959 F.2d 1307, 1313 (5th Cir. 1992). Petitioner was charged with solicitation of murder. A person commits this offense if, with intent that murder be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute murder or make the other a party to murder. TEX. PENAL CODE ANN. §§ 15.03(a) & 19.02 (Vernon 1994); *Sheffield v. State*, 847 S.W.2d 251, 258 (Tex. App.--Tyler 1992, pet. ref d). See *also McGann v. State*, 30 S.W.3d 540, 547 (Tex. App.--Fort Worth 2000, pet. ref'd) (offense of criminal solicitation complete when culpable request or inducement to commit first degree felony is unilaterally presented).

3. Discussion

Sudha Vallabhaneni ("Vallabhaneni") testified she moved from India to the United States in 1989 at age thirty one. (SF-9 at 239). In 1994, she met Ganesan as a result of a matrimonial ad placed in an Indian magazine by her brother. (*Id.* at 241-43). Ganesan proposed on their first date, stating Vallabhaneni was his wife in his eyes. Vallabhaneni accepted his proposal. (*Id.* at 244-45). Vallabhaneni quickly became unhappy in the marriage. She moved out in September 1996. (*Id.* at 245-46). Vallabhaneni testified she was afraid of Ganesan so she waited until he was out of the country to leave him. (*Id.* at 246). She hired Amy W right ("Wright") as her lawyer. Wright filed a divorce petition in October or November. (*Id.*).

Vallabhaneni continued to be fearful Ganesan would hurt her. *(Id.* at 264-65). As a result of her fear, she used an alias at work. (SF-10 at 20-21). On her lawyer's advice, Vallabhaneni began taping her phone conversations with Ganesan. (SF-9 at 272-74). In January 1997, during one of those taped conversations, Ganesan told her the divorce action was ensuring his computer chip product would "die". Ganesan then stated "Let me tell you this. I don't care what you do. If this product dies, one of us will be dead, yeah, I promise you that. *(Id.* at 255-61, *Ganesan,* 45 S.W.3d at 202).

James Edward Hammonds ("Hammonds") testified he met Ganesan in May 8, 1997 at the Travis County Jail. (SF-9 at 58-61). Hammonds was newly released from Texas prison and was still wearing his prison uniform. *(Id.* at 58). Ganesan was upset at his wife because his incarceration resulted from a phone call to her in violation of a restraining order. (Id. at 65-66). He told Hammonds his wife was taking more than three quarters of a million dollars from him. *(Id.* at 66).

Ganesan then asked Hammonds "Do you know of anyone, or can you take care of my wife for me?" *(Id.* at 67). He told Hammonds "I can set you up with a job, a place, if you can just do this for me." (*Id.* at 69). Hammonds gave Ganesan his phone number. (*Id.* at 70). Shortly thereafter, Hammonds was released from jail. (*Id.*).

On May 21 Hammonds received a phone call from Ganesan. (*Id.* at 72). Ganesan asked if Hammonds remembered their prior conversation. (*Id.*) Ganesan offered to meet Hammonds to continue the discussion. (*Id.* at 72-73). When Hammonds declined, Ganesan offered to meet Hammonds when Hammonds returned to Austin for a court date. *(Id.* at 73-74). Hammonds testified he believed Ganesan was asking him to take the life of Ganesan's wife. (!d. at 83). Hammonds called the police after the phone call ended. (*Id.* at 74). The police arranged to have Hammonds call Ganesan back and record the conversation. *(Id.* at 77). Hammonds testified during the call Ganesan back-pedaled and tried to get out of the conversation. *(Id.* at 78). Phone records confirmed Ganesan called Hammonds on May 21. (SF-9 at 147). A police officer testified Ganesan confirmed the call to him as well. Ganesan told the officer he called "to get in touch with a guy who said he would talk to my wife." *(Id.* at 171-72).

Reda Prier ("Prier") testified she met Ganesan through an Internet chat line.-(SF-8 at 46). They first met in person when Prier traveled to Texas at Ganesan's request in July 1998. *(Id.* at4647). Prier and her son moved in with Ganesan later that month. *(Id.* at 51).

During the time Prier lived with him, Ganesan told her he was involved in some litigation. (*Id.*). Ganesan subsequently told Prier in an e-mail that the litigation was not going well. He told her to memorize the names of three people involved, because if something happened to him the three needed to be taken care of. *(Id.* at 55). Two of the people were Vallabhaneni and Wright. (*Id.*). Ganesan explained the litigation involved a claim by Vallabhaneni that she was his common-law wife and was entitled to profits from his business. *(Id.* at 57). According to Prier, Ganesan stated Vallabhaneni would not get a damn thing from him. *(Id.* at 58). Ganesan also told her he filed bankruptcy because he preferred the money was tied up in court instead of going to Vallabhaneni. *(Id.* at 68). Prier further stated Ganesan said he had other money outside of the country. (*Id.* at 67).

Prier testified Ganesan said he would like to do away with Amy W right. *(Id.* at 69). He asked Prier if she knew of anyone. *(Id.* at 69-70). Ganesan told Prier that, if he could get rid of the attorney, anyone else would be afraid to handle the case. *(Id.* at 70). He also said he had connections who could take care of Vallabhaneni. (!d. at 70-71).

According to Prier, Ganesan asked in a subsequent conversation if she knew of anybody who would get Wright out of the way. *(Id.* at 71-72). Prier testified she was afraid to tell Ganesan she knew of no one who would do something like that. *(Id.* at 72). Ganesan insisted finding someone should be her top priority. *(Id.* at 75).

Some time later, Ganesan told Prier he had received court paperwork. *(Id.* at 76-77). He again asked if Prier knew anybody who could take care of Wright because "somebody needed to take [Wright] out, rape her, abuse her and do things to her that no woman could imagine having done to them and leave her for dead." *(Id.* at 77).

In a subsequent conversation, Ganesan asked Prier about her contact. He stated Halloween weekend would be the best weekend to do it. (*Id.* at 85). A few days later, Prier lied and told Ganesan her contact had arrived in San Antonio. *(Id.* at 86-87). When Ganesan heard no news, he accused Prier of lying to him about her contact. (Id. at 88). Subsequently, Prier lied to Ganesan and told him her contact had loosened the gas line and bolts on the steering column in Wright's husband's car. *(Id.* at 91). Approximately a week later, after Ganesan kicked her out of his house, Prier went to Wright and then the police. *(Id.* at 92-97)

Prier later returned to Ganesan's house to retrieve her belongings. *(Id.* at 101). Ganesan and his attorney were also there. (*Id.*). Prier testified she was afraid of them. As a result, she called the police and told them to rip up her statement. *(Id.* at 102-04). Prier also testified she continues to fear Ganesan. *(Id.* at 111-15).

Ganesan's bankruptcy attorney testified Ganesan knew a mediation was to take place in the bankruptcy case on

November 6,1998. (SF-9 at 183-85). On Ganesan's instructions, the attorney retrieved $106,000 in cash from Ganesan's home. *(Id.* at 190).

The court of appeals found this evidence was sufficient to support a conviction for solicitation of murder. *Ganesan,* 45 S.W.3d at 204. This Court must accept the finding unless it "was based on an unreasonable determination of the facts in light of the evidence presented." *Hill*, 210 F.3d at 485. Petitioner has failed to meet this heavy burden. The record shows Ganesan asked Prier to find someone to kill his wife. His desire to arrange for Vallabhaneni's death was corroborated by Ganesan's prior attempt to hire someone to kill her, Ganesan's threats to her and Vallabhaneni's fear that Ganesan intended to hurt her. Moreover, the evidence showed Ganesan had motive to kill and sufficient cash to pay for the crime.

Ganesan argues Prier's testimony was insufficiently corroborated. Ganesan discounts Hammond's testimony because, during the follow-up conversation, he "back-pedaled" to Hammonds. The question here is not, however, whether Ganesan solicited Hammonds to murder Vallabhaneni. The testimony of both Hammonds and Vallabhaneni clearly corroborated Prier's testimony as to Ganesan's desire and motive to accomplish the crime of solicitation of murder.

Ganesan also complains the testimony of Vallabhaneni and Prier did not evidence his criminal intent. Rather, he maintains the conversations described merely show his impatience and exasperation with his wife. The trial jury was in the best position to assess the credibility of the testimony of the witnesses. Ganesan has not provided this Court with any reason to disregard that assessment.

Ganesan further maintains the evidence at best proved only solicitation of solicitation. That is, the evidence did not show the act of solicitation was completed because Ganesan did not ask Prier to kill Vallabhaneni. Instead, at most, Ganesan asked Prier to solicit murder. However, as the state appellate court held, had Prier arranged for someone else to kill Vallabhaneni, Prier would have been a party to the murder. This is sufficient under Texas law to constitute the offense of solicitation of murder. See TEX. PENAL CODE ANN. § 15.03(a) (person commits solicitation if he requests another to engage in conduct that would make the other a party to felony); *Johnson v. State,* 650 S.W.2d 784, 787 (Tex. Crim. App. 1983) (request by defendant that other person employ third party to commit murder sufficient to constitute solicitation of murder because other person would be party to murder). See also *Underwood v. State,* 853 S.W.2d 858,860 (Tex. App.-Fort Worth 1993, no. pet.) (actual agreement between defendant and another not required to support conviction for solicitation to commit capital murder). This ground for relief is without merit and should be overruled.

B. Jury Argument

Petitioner next argues the prosecutor made improper remarks during closing argument. An improper jury argument rarely justifies federal habeas relief. A petitioner must show the argument was so prejudicial it denied him a fair trial. *Donnelly v. DeCristoforo,* 416 U.S. 637,642-43,94 S. Ct. 1868, 1871 (1974); *Barrrentes v. Johnson,* 221 F.3d 741, 753 (5th Cir. 2000). A trial is fundamentally unfair if the petitioner would not have been convicted but for the prosecutor's persistent and improper remarks. *Darden* v. *Wainwrlghf,* 477 U.S.168,181,106 S. Ct. 2464, 2471 (1986); *Rushing v. Butler,* 868 F.2d 800, 807 (5th Cir. 1989). During jury argument, however, the prosecutor is permitted to state what he believes to have been established by the evidence and to fairly comment on it. *Dowthltt v. Johnson,* 230 F.3d 733, 755 (5th Cir. 2000). See also *United States v. Gordon,* 876 F.2d 1121, 1127 (5th Cir. 1989) (in jury argument attorney may state fair inferences and conclusions he wishes jury to draw from evidence presented at trial).

During closing argument Prosecutor Amy Casner stated:

> The police got involved, and they did everything they could. The DA's office took it to trial, and we have done everything we could. You are the last link in the chain and it rests with you now. We have done everything we could. We brought you all the evidence, and the evidence tells you he's guilty. And if you acquit that man, you are signing those two women's death warrants.
>
> * * *
>
> Ladies and gentlemen, you will be signing the death warrants of those two young women if you acquit this man because the evidence tells you he's guilty.

(SF-10 at 66-67). Defense counsel objected to the argument as improper and inflammatory. The trial judge overruled the objection. (*Id.*) In his closing argument, Prosecutor Bill Mange stated:

> Well, in this case they have tried to put Amy W right on trial. They have tried to put Reda Sue Prier on trial. They have tried to put everybody on trial. In fact, that's exactly what Mr. Evans said in his argument, because I took notes. What he said was,

> this case is about Reda Sue Prier. This trial is about Reda Sue Prier. That's his argument. No, it's not. State of Texas versus Apparajan Ganesan, who is trying to kill these two women, and if he walks away with a not guilty, they are dead. Count on it.

(*Id.* at 94-95). Defense counsel again objected to the argument as improper and inflammatory. The trial judge instructed the prosecutor to refrain from inflammatory statements. *(Id.* at 95)

The Magistrate Court agrees with the Texas appellate court that the "death warrant" reference was extreme. *Ganesan,* 45 S.W.3d at 206. However, as reviewed above, substantial evidence of Petitioner's guilt was presented during trial. The evidence also showed Ganesan had attempted to arrange for the death of Vallabhaneni on more than one occasion. The gist of the reference to Petitioner's history did not, therefore, clearly render the verdict unfair. *See United States v. Vaccaro*, 115 F.3d 1211,1216 (5th Cir.1997) (effect of jury argument limited because jury presumably has common sense to discount hyperbole of an advocate). Accordingly, Petitioner has failed to establish he is entitled to relief on this claim. *See Foy*, 959 F.2d at 1319 (statement by prosecutor that if jury voted to acquit it should give prosecutor enough time to move out of town did not render trial unfair); *Thompson v. Mississippi,* 914 F.2d 736,739-40 (5th Cir.1990) (declining to grant habeas relief based on prosecutor's argument at trial imploring jury to find petitioner guilty to deter similar crimes from happening again).

C. Appellate Reversal

Petitioner also maintains the appellate court erred in not ordering a new trial. According to Ganesan, the reversal on one count of a two-count indictment mandated a new trial on the second count. Petitioner does not make clear the legal basis of this claim. To the degree he is asserting the evidence is insufficient to support his conviction on the second count, the Magistrate Court has already found such a claim is without merit. The jury was clearly instructed on each count and entered separate verdicts as to both guilt and the sentence to be imposed on each count. (Hab. Tr. at 15-16, 25-26). Under Texas law, these separate verdicts are sufficient to support a conviction on one count when the second count is reversed. *See Ex parte Mills,* 795 S.W.2d 203, 204-05 (Tex. Crim. App. 1990) (where jury finds defendant guilty on both counts of two count indictment and separately assesses punishment for each count, and there is insufficient evidence to support a finding of guilt on one of the counts, spillover effect of the improper conviction does not require new punishment hearing on surviving conviction). Petitioner has failed to show how this is contrary to any clearly established federal law. He should not, therefore, be granted relief on this claim.

D. Extraneous Offense

Petitioner also complains the trial court erred in admitting extraneous offense testimony. Specifically, he complains the trial judge failed to perform the necessary balancing test prior to admitting the testimony of James Hammonds.[1]

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[1] Respondent argues Petitioner has not exhausted this claim. The Court need not consider this argument because Ganesan is not entitled to relief on this basis. 28 U.S.C. § 2254(b)(2) (habeas corpus petition may be denied on the merits, notwithstanding failure of petitioner to exhaust state court remedies); *Smith v. Cockrell*, 311 F.3d 661, 684 (5th Cir. 2002) (federal court may deny habeas relief on merits even where claim is unexhausted and procedurally barred).

A federal court may grant habeas relief only when "the violation of the state's evidentiary rules results in a denial of fundamental fairness." *Herrera v. Collins*, 904 F.2d 944, 949 (5th Cir. 1990). *See also Givens v. Cockrell*, 265 F.3d 306, 308 (5th Cir. 2001) (state court's erroneous admission of prejudicial evidence justifies habeas relief only when evidence is crucial, critical, and highly significant); *Hafdahl v. Johnson,* 251 F.3d 528,536 (5th Cir.), *cert denied,* 534 U.S.1047, 122 S. Ct. 629 (2001) (habeas relief based on wrongful admission of extraneous offense evidence merited only if error is of such magnitude it resulted in "fundamental unfairness").

The record shows the trial judge held a hearing on the admissibility of the testimony prior to the second day of trial. The prosecution made a proffer of Hammonds' testimony and both sides presented argument concerning its admission. (SF-9 at 5-42). The trial judge considered the argument and ruled the evidence was admissible. In so doing, the judge found the testimony was relevant to corroborating Ganesan's intent, similar to that of Prier, relevant apart from proving Ganesan's character, and that the probative value outweighed the prejudicial effect. (*Id.* at 45-49). Before Hammonds testified, the trial judge gave a limiting instruction to the jury, reminding them Ganesan was not on trial for any prior transactions described by Hammonds. (*Id.* at 56-57).

Ganesan is not entitled to relief on this claim. First, Petitioner has not shown either that the trial judge failed to use the correct legal standard in considering the admission of the extraneous offense evidence or that her conclusion was incorrect. *See, e.g., United States* v. *Bermea*, 30 F.3d 1539, 1562 (5th Cir. 1994) (similarity between elements of the extrinsic offense and those of charged offense may enhance probative value of extrinsic offense evidence). Nor, especially in light of the limiting instruction given to the jury, has Ganesan established fundamental unfairness. Accordingly, Petitioner should not be granted relief on this claim.

E. Recusal

Ganesan further asserts the trial judge should have recused herself. He states the trial judge was in the final stages of pregnancy during the trial. Ganesan describes the case against him as having its roots in a domestic situation. He argues "[b]ecause pregnancy frequently contains considerable emotional content, especially as delivery nears, the judge's ruling may have been influenced by her condition." (Hab. Pet. Add'l Memo. at 55).

This claim fails for at least three reasons. First, Ganesan has not identified any specific bias which resulted in harm to him during trial. Rather, he claims only that the trial judge's pregnancy may have adversely influenced her evidentiary rulings. Second, this Court has already found those rulings were not improper. Third, Petitioner is perilously close to claiming women are too emotional to act as judges. The legal system in this country is long past such antediluvian thinking. Petitioner is not entitled to relief on this claim.

F. Jury Charge

Ganesan next maintains the jury instructions were improper. He asserts the trial court should have charged the jury on the affirmative defense of renunciation.

An improper jury instruction in a state criminal trial rarely forms the basis for federal habeas relief. *Galvan v.*

Cockrell, 293 F.3d 760, 764 (5th Cir. 2002). When reviewing jury instructions in federal habeas, "[t]he only question ... is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Hughes v. Johnson,* 191 F.3d 607, 627 (5th Cir. 1999) (quoting *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 482 (1991)).

Renunciation is the only statutorily specified affirmative defense to criminal solicitation. See TEX. PENAL CODE ANN. § 15.04(b) (Vernon 1994). Under Texas law, it is a defense to prosecution for criminal solicitation that "under circumstances manifesting a voluntary and complete renunciation of his criminal objective the actor countermanded his solicitation or withdrew from the conspiracy before commission of the object offense and took further affirmative action that prevented the commission of the object offense." *Id. See also McGann,* 30 S.W.3d at 547 (renunciation must be voluntary, complete, and must either avoid or prevent commission of the offense).

Ganesan argues he was entitled to the instruction because the testimony of Hammonds clearly raised the issue. However, Ganesan was not charged with solicitation of Hammonds. The issue at trial was whether Ganesan completed the offense of solicitation of Prier. Thus, whether Ganesan renounced his attempt to solicit Hammonds was not a matter on which the jury was, or should have been, charged. This claim for relief should be denied.

G. Ineffective Assistance of Counsel

Petitioner finally alleges his trial counsel was ineffective in: (1) failing to play additional hours of taped conversations between Ganesan and his wife; (2) not playing additional portions of the taped conversation between Ganesan and Hammonds; (3) failing to request the jury charge include a renunciation instruction; (4) not challenging the state's evidence concerning remuneration; (5) failing to contest the trial court's admission of Hammonds' testimony; (6) not producing a witness to rebut Hammond's testimony; (7) failing to file a motion to disqualify the trial judge; and (8) advising him not to testify at trial.

1. Applicable Law

To establish an ineffective assistance of counsel claim, Ganesan must meet the two-prong test under *Strickland v. Washington*, 466 U.S. 668,104 S. Ct. 2052 (1984). He must demonstrate both: (1) his counsel's performance was deficient, including "errors so serious that counsel was not functioning as the 'counsel' guaranteed defendant by the Sixth Amendment"; and (2) his counsel's "deficient performance prejudiced the defense." Id. at 687, 104 S.Ct. at 2064; *United States v. Walker*, 68 F.3d 931, 933 (5th Cir. 1995).

To establish deficient performance, Ganesan must show his counsel's acts were not "reasonable in light of all the circumstances, "and he must overcome the "'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" See *United* States *v. Haese*,162 F.3d 359, 364 (5th Cir. 1998) (citing *Strickland*, 466 U.S. at 687,104 S.Ct. at 2064); *United States v. Samuels*, 59 F.3d 526,529 (5th Cir.1995) (strong showing required by defendant to place counsel's conduct outside wide range of reasonable professional assistance). To demonstrate prejudice, he must show "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"

Haese,162 F3d at 364 (citing *Pratt v. Cain*, 142 F.3d 226,232 (5th Cir.1998)); *United States v. Kinsey*, 917 F.2d 181, 183 (5th Cir. 1990).

Ganesan must show more than a possibility of a different result. *Cockrum v. Johnson*, 119 F.3d 297, 302 (5th Cir.1997). He must also show prejudice rendered the proceeding "fundamentally unfair or unreliable." *Ransom* v. *Johnson*, 126 F.3d 716,721 (5th Cir.1997). When a defendant fails to meet either requirement of the *Strickland* test, his ineffective assistance of counsel claim is defeated. *See Belyeu v. Scott*, 67 F.3d 535,538 (5th Cir.1996); *United States v. Gaudet*, 81 F.3d 585, 592 (5th Cir.1993). The Fifth Circuit "has also made clear that counsel is not required to make futile motions or objections." *Koch v. Puckett*, 907 F.2d 524,527 (5th Cir.1990). Likewise, counsel is not "deficient for failing to press a frivolous point." *Sones v. Hargett*, 61 F.3d 410, 415 (5th Cir. 1995).

2. Discussion

Petitioner first asserts his counsel erred by failing to play additional hours of taped conversations between Ganesan and his wife. In support, he asserts the jury in his trial for a Class A misdemeanor charge based on those same tapes returned a not guilty verdict after hearing the entire tape. However, Petitioner fails to specify the misdemeanor charge he faced. Moreover, he has provided this Court with neither transcripts nor even a description of the contents of the unplayed portion of the tapes. This type of unsupported allegation is insufficient to merit habeas relief. *See Anderson v. Collins*, 18 F.3d 1208, 1221 (5th Cir. 1994) (court cannot begin to analyze claim of ineffective assistance of counsel without affirmative showing of missing evidence or testimony). Further, Ganesan has not rebutted the presumption that counsel's failure to play additional portions of the tape was a strategic decision. *See Bell v. Cone,* 535 U.S. 685, 698,122 S. Ct. 1843, 1852 (2002) (petitioner presenting ineffective-assistance claim must overcome presumption that challenged action might be considered sound trial strategy). Petitioner has not, therefore, shown he is entitled to relief on this claim.

Ganesan next argues counsel should have played additional portions of the taped conversation between Ganesan and Hammonds. He claims the tape would clearly have negated Hammonds' testimony as corroboration of Prier. As with his prior claim, Ganesan does not provide a transcript or other description of the actual statements recorded on the tape. He does not, therefore, state a sufficient basis on which to grant habeas relief. *See Millerv. Johnson,* 200 F.3d 274, 282 (5th Cir. 2000) ("conclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding"); *Anderson,* 18 F.3d at 1221.

Petitioner also maintains his attorney failed to request inclusion of a renunciation instruction in the jury charge. The Magistrate Court has already concluded Ganesan was not entitled to an instruction on the affirmative defense of renunciation. Counsel was not, therefore, ineffective for failing to make a meritless request. *Sones*, 61 F.3d at 415; Koch, 907 F.2d at 527.

Ganesan further claims counsel erred by not challenging the state's evidence concerning remuneration. According to Petitioner, his attorney should have presented evidence to debunk testimony showing $2,000 in traveler's checks and $4,000 in cash were found in Ganesan's house after his arrest. Ganesan maintains witnesses could have testified the monies were withdrawn from his accounts six years before. Once again, Ganesan neither identifies the purported witnesses by name nor provides an affidavit evidencing what their testimony would have been. Without such evidence, this Court cannot begin to determine if he is entitled to relief. *Anderson, 18* F.3d at 1221.

Petitioner next contends his attorney should have contested the trial court's admission of Hammonds' testimony. As reviewed above, defense counsel objected to the admission of the testimony. A hearing was conducted and counsel argued at length against the admission of the evidence. Ganesan fails to identify what more his attorney should have done. Moreover, the Magistrate Court has already reviewed the trial court's decision and found no clear error. This claim for relief should be denied.

Ganesan also alleges counsel erred in not producing a witness to rebut Hammond's testimony. Specifically, he claims counsel should have called Mr. Garcia, the cell mate of Hammonds and Ganesan, to refute the testimony. This claim fails for at least two reasons. First, even Petitioner admits counsel attempted to locate Garcia. Ganesan essentially complains only that counsel did not try hard enough. Second, Petitioner provides no evidence, other than his own self-serving statements, of the testimony Garcia would have provided.[2] Thus, Ganesan should not be granted relief on this claim.

Petitioner further asserts his attorney should have filed a motion to disqualify the trial judge. The Magistrate Court has already concluded Ganesan has stated no legal basis on which to seek disqualification of the judge. Moreover, Petitioner states only that "[t]he verdict might well have been different with a different judge." (Hab. Pet. Mem. at 27). This failure to identify how counsel's failure actually resulted in prejudice dooms this claim.

---

[2] The Magistrate Court also notes Hammonds testified Garcia was very intoxicated while they shared the cell. (SF-9 at B4). The credibility of any testimony he might have provides seems, therefore, somewhat questionable.

Finally, Ganesan argues counsel wrongly advised him not to testify at trial. He claims his testimony would have carried extraordinary credibility and resulted in a different verdict. The Court notes Petitioner did testify during the punishment phase of trial. Prior to his testimony, he acknowledged defense counsel had reviewed the consequences of exercising his option to testify, both before the guilt phase and the punishment phase. Ganesan stated he decided not to testify at the guilt phase following those discussions. (SF-12 at 89-90). Thus, it is clear Petitioner was not prevented from testifying. Nor has Ganesan established that any testimony he could have provided would have overcome the testimony of the state's witnesses. Moreover, counsel's recommendation whether to testify is clearly a question of strategy to which deference is owed. *Robison v. Johnson,* 151 F.3d 256,262 (5th Cir.1998) (recommendation against defendant's testifying in capital murder trial represented reasonable trial strategy). *See also Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002) (counsel's "conscious and informed decision on trial tactics and strategy" does not constitute ineffective assistance of counsel unless strategy was so poor it robbed the defendant of any opportunity to get a fair trial). Accordingly, this ground for relief is without merit and should be denied.

IV. RECOMMENDATION

The Magistrate Court recommends the District Court DENY Petitioner's Application for Habeas Corpus under 28 U.S.C. § 2254. The Magistrate Court further recommends the District Court DENY Petitioner's Motion for Summary Judgment.

V. WARNING

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within ten (10) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. See 28 U.S.C. § 636(b)(1)(C); *Thomas v. Am*, 474 U.S.140,150-53,106 S. Ct. 466, 472-74 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996)(*en banc*).

The Clerk is directed to send a copy of this Report and Recommendation to the parties by certified mail, return receipt requested.

SIGNED the 23rd day of July, 2003

Signed:\\ Stephen H. Capelle
STEPHEN H. CAPELLE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

Apparajan Ganesan §
TDCJ-ID #904088 §
Petitioner, §
§
v. § CASE NUMBER:
§ A:02-CV-753-JN
Janie Cockrell, Director §
Texas Department of Criminal §
Justice, Institutional Division §
Respondent §

REBUTTAL TO REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

Now comes Petitioner Apparajan Ganesan and files the attached response to the Report and Recommendation of the United States Magistrate Judge (Magistrate's Report).

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Notes for Writ of Certiorari:

1. Page numbers are left as in original petition; they have not been changed to agree with the page numbering in this Appendix.

2. Charge to the Court is not included in this Appendix. It is given elsewhere in this Writ.

Opening Remarks

1. Magistrate Stephen H. Capelle summarized the Procedural History, Standard of Review, and Issues Raised (pages 1-3 of his rebuttal) by Petitioner. However, his detailed discussion (beginning on page 3) of the issues raised and the legal aspects failed to live up to the high judicial standards expected of a Federal Magistrate. The expected action of the Magistrate is an impartial review from a position most favorable to the verdict; the Magistrate was not impartial. We note for the record that there is **not one** mention of any of the numerous cites Ganesan made.

2. Instead of acting as an impartial jurist, there is no hint that the Magistrate acted in any way except as if he were the Respondent. Had he taken the time to review just a few of Ganesan's cites on each ground and comment on their applicability, his lack of impartiality would not be so obvious. When he was unable to find any basis for arguing against a claim by Ganesan, he chose to ignore it, further demonstrating his lack of impartiality.

3. As further evidence of Magistrate's complete lack of impartiality, Magistrate complained of missing supporting evidence that Ganesan should have supplied. Magistrate, however, failed to mention that Ganesan, who is incarcerated in the Texas prison system and is acting Pro Se, in his filings, specifically requested an evidentiary hearing to obtain just the information Magistrate wanted. Details of these will be given later in this rebuttal.

4. This Rebuttal begins with a discussion of a part of Ground 2 that was **wholly uncontested** by either the Respondent or the Magistrate. This in and of itself is sufficient for the writ to issue. This Rebuttal then addresses each point made by the Magistrate according to the Ground to which it applies.

Uncontested Issue

5. By far the most egregious failing by the Magistrate is in his discussion of Ground 2, Appellate Reversal, (page 10-11). In Ganesan's Petition - Additional Memorandum, page 12, and in PETITIONER'S REBUTTAL TO RESPONDENT COCKRELL'S ANSWER (hereafter Rebuttal to Respondent) paragraphs 19 and 20 this issue is clearly addressed. However, in Magistrate's Rebuttal, he totally failed to address Ganesan's argument, which is well summarized in Petitioner's Rebuttal's paragraphs 19 and 20:

> Entering separate verdicts is not relevant as to whether they [the jury] were instructed to consider each count separately, and it is a misstatement of logic and almost an insult to claim otherwise, as respondent does. The jury was directed by the judge in section VIII of the Charge of the Court to consider the charge regarding Vallabhaneni ***bearing in mind*** the charge regarding Wright, and it was the charge regarding Wright that was overturned on appeal (page 12 of 67 of Petition). Respondent, nowhere in its 29 page response, ever mentions this linking. Respondent obviously understands how serious such a linkage is and has therefore chosen to ignore it, hoping to keep it from the mind of this Court.
>
> "It [the jury] followed the Court's instruction to regard each count as separate and distinct" (Featherstone v. Estelle 948 F.2d 1497, 1504). In the instant case, no such instruction was given, and in fact the jury was instructed to link them together (Charge of the Court, opening sentence of Sections VIII).

Ganesan included the Charge of the Court as an attachment in his Rebuttal to Respondent. Since Magistrate went to lengths to find cites to support his arguments throughout his rebuttal, he clearly could find no statute or cite to discount this **unconstitutional linkage**. For the record, Ganesan notes that respondent also completely avoided addressing this issue, so clearly both Magistrate and respondent could find no statute or cite to discount it. In U.S. v. Adams, 581 F.2d 193, 198, "prejudice necessarily inheres whenever multiple charges are jointly tried." Also, in U.S. v. Lilly, 983 F.2d 300, 305,

> Every successful post conviction challenge to an indictment of multiple counts necessarily contains within it seeds for the assertion that the jury heard many charges .... District Court instructed the jury no fewer than 7 seven times that the government's proof on each of the charges to be weighed separately

In the instant case, the judge did **not** so instruct *even one time*.

Further, Ganesan asserts that the jury did not properly compartmentalize evidence as to the two counts, and it did not separately consider defendant's guilt as to each and every count.

6. The closest thing to a hint that maybe the jury might have considered the two counts separately is that the jury signed separate pieces of paper for each count. The quotation from paragraph 19, above, addresses this. The papers were, as the Magistrate knows, supplied to the jury *by the Court*. The two pieces of paper do **not** represent legal instructions; legal instructions are the Charge of the Court. If the Magistrate expects the jury to rewrite the two pieces of paper as one piece of paper with both names on it, then where in the Charge of the Court are they given that option? But even

more to the point, each sheet of paper relates to a separate charge. No where does Ganesan claim that there was only one charge. Verdicts indicate only independent affirmation, **not independent consideration**, of each count. The issue is that the jury is **directed** to consider charge two (Vallabhaneni) **bearing in mind** the **overturned** charge one (Wright).

GROUND 1 – Prosecutorial Misconduct (Jury Argument)

References:

Ganesan v. State 45 S.W. 3d 197, 205-207
Habeas Petition, Additional Memorandum,
Pages 1 - 10
Respondent's Answer, Pages 8-11
Petitioner's Rebuttal, Pages 5-7, 24, 25
Magistrate's Report, Pages 8-10

Magistrate's Contention:

7. Petitioner must establish that Prosecutors' remarks resulted in an unfair trial (an unfair trial is one in which, absent the Prosecutors' remarks, the Petitioner would not have been convicted). Further, citing United States v. Gordon, 876 F.2d 1121, 1127 (5th Cir. 1989), "in jury argument, attorney may state fair inferences and conclusions he wishes jury to draw from evidence presented at trial." Magistrate then quotes from the transcript two pronouncements by Prosecutor Casner, "if you acquit, you are signing those two women's death warrants" and one by Prosecutor Mange, "if he walks … they are dead."

Ganesan's Rebuttal:

8. It took *many* such malicious statements before the Judge finally instructed the Prosecutor to refrain from inflammatory

statements, and both Texas Appellate Court and Magistrate agreed these references were extreme, so "fair inferences and conclusions" does not apply. Apparently the Magistrate equates "fair" with extremism, even in criminal case convictions where guilt is suppose to be beyond a reasonable doubt. Even the Judge eventually agreed the Prosecutors were over the line, but by then the damage was done. Magistrate blows this off as a "reference to Petitioner's history," citing U.S. v. Vaccaro, 115 F.3d 1211, 1216 that jury "has common sense to discount hyperbole," but this is **not** hyperbole ("exaggeration for effect, **not meant** to be taken literally" from Webster's New World Dictionary of the American Language). Next, Ganesan sees no relevance in citing Foy 959 F.2d at 1319 "... give prosecutor enough time to move out of town," except to show what **real** hyperbole is. Even the reference to Thompson v. Mississippi, 914 F.2d 736, 739-40 that relates to deterring "similar crimes from happening again" is a serious stretch of the imagination because the argument by Prosecution was a "death warrant" while the charged crime was solicitation. Perhaps Magistrate is confused: solicitation of murder is not similar to murder nor attempted murder.

9. The prosecutorial misconduct warped the fact finding function of the jury by deflecting its attention away from consideration of evidence presented at trial (see Smith v. Philips, 455 U.S. 209, 217, 102 S.Ct. 940, 946).

10. As further evidence that the jury would rule otherwise, absent these remarks, comes **directly** from the mouth of the Prosecution. The Prosecutor stated *on the record* that "the jury was laughing" at him and expected him "to dismiss the case." But after his extreme allegations, jury found Ganesan guilty of two counts, one of which was overturned by the State Appellate Court, even though that Court considered the case in light most favorable to the jury's verdict (Ganesan v. State, 45 S.W. 3d 197, 204). Therefore, it is completely

unreasonable to argue that the verdict could not have been affected by both Prosecutors' multiple improprieties.

11. Nothing in the record supported the Prosecutors' "death warrant" accusations, and this has been noted by both the State Appellate Court and the Magistrate. The trial judge added inflammation in the jury's mind when she put a stamp of approval on it by overruling defense objections and thereby enabling the second Prosecutor to repeat the allegations until after the third time. Prosecution understood the impact of this inflammatory charge and thus continued to repeat it. Clearly, the "death warrant" remarks were far from harmless.

12. State Appellate Court asserted that Ganesan failed to preserve any error with regard to Prosecutor Mange's "they are dead" rant, since defendant must object to an argument and pursue the objection to an adverse ruling (Ganesan v. State, 45 S.W. 3d 197, 206). But in Brown v. Estelle, 468 F.Supp. 42, 591 F.2d 1207:

> Burden placed on defendant to constantly object to Prosecutors' continuous violations in arguments so prejudiced defendant as to justify his failure to object to every instance where improper argument was made, and so prejudiced defendant as to cause him to suffer unfair trial and deprivation of due process.

13. Also, in U.S. v. Thames, 943 F.Supp 693, 701,

> A [third] factor in determining whether a new trial is warranted is whether the court gave caution instructions that effectively cured the prejudice caused by the prosecutor's conduct. Because the defendant did not make an objection at trial to prosecutor's closing arguments, no such instructions were given.... [But] if prosecutor's argument is so grossly prejudicial that the harm cannot be removed by objections or instructions, there is no duty on the

> part of a defendant to object and move for a mistrial to preserve the matter for appellate review.

Then in Berger 295 U.S. at 88, 55 S.Ct at 633,

> A prosecutor occupies a special position of authority. As the United States Supreme Court has stated, "The [prosecutor] is the representative not of an ordinary part to a controversy but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." [As a result] improper suggestions, insinuations and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

The prosecutor in the instant case did insinuate knowledge of prejudicial facts unavailable to the jury.

14. Unlike many appeals arising from claims of prosecutorial misconduct, the instant case does not involve one or a few isolated episodes. Rather, it involved repeated, intentional, and escalating misconduct during two closing summations. "Some occurrences at trial may be clearly too prejudicial for … a curative instruction to mitigate their effect" (Donnelly v. DeChristoforo, 416 U.S. 637 at 644).

15. Applying United States Ex Rel. Shaw v. De Robertis, 755 F.2d 1279, 1284-1285, the totality of the circumstances makes it sufficiently likely to convey the Prosecutors' statements out of the region of Constitutionally permissible conduct, and this is affirmed by the State Appellate Court and the Magistrate. These circumstances include the fact that the Judge gave no **curative** instruction to the jury on most of the occasions, the fact that the statements were repeated in rebuttal argument to which defense had no opportunity to respond, and the fact that the statements were made in a context where the Prosecutors implied they had evidence that

was not on the record but was convincing to the prosecutors that the defendant, if freed, would kill the alleged victims.

16. The State Appellate Court correctly applied established Federal case law in opining that the prosecutorial conduct cannot be characterized as a mere deduction from the evidence or plea for law enforcement (page 206), and it correctly noted the reduced efficacy of the trial court's corrective instruction by permitting a majority of the remakes to go uncorrected. However, State Appellate Court came to an **objectively unreasonable** conclusion when it opined that the remarks were not so manifestly improper or prejudicial under the circumstances as to warrant reversal. The **objectively unreasonable** characterization is inferred from the fact that the prosecutor stated, on the record, prior to his remarks, that the jury was laughing at him and expected him to dismiss the case. His remarks then put a moral sanction on the jury's inability to objectively consider the evidence and thus prejudiced them into finding Ganesan guilty on both counts, one of which was overturned by the State Appellate Court, which reviewed the evidence in light most favorable to the verdict.

17. The State Appellate Court also came to a conclusion opposite to that of the Supreme Court which has opined "some occurrences at trial may be clearly too prejudicial for … a curative instruction to mitigate their effects" (Donnelly v. DeChristoforo, 416 U.S. at 644; 94 S.C. 1868).

18. Reasonable jurists have debated these issues resulting in courts issuing different verdicts, and Floyd v. Meechum, 907 F.2d 357 comes close to the instant case.

(a) Just as Sherry Gattison's credibility determined the evidence against Floyd, the credibility of Reda Sue Prier determined the evidence against Ganesan.

(b) As in *Floyd*, the Appellate and Habeas Courts did not characterize the evidence as overwhelming or even strong, but substantial enough to support a conviction.

(c) As in *Floyd*, the Appellate Court noted that Prosecutors' inflammatory assertion cannot be characterized as a mere deduction from the evidence or a plea for law enforcement.

(d) As in *Floyd*, the prosecutors' remarks implicated Ganesan's Constitutional right to confront evidence against him (Prosecutors' repeatedly told jury the alleged victims would die if Ganesan were let go, implying evidence that was not presented at trial and complained about it on appeal) rather than the generalized right to due process.

(e) As in *Floyd*, defense counsel did not have the opportunity to respond to the prosecutors' most egregious remarks at final summation, nor did defense make a tactical decision not to object to the improper comments that encouraged prosecutor to commit reversible errors.

(f) As in *Floyd*, Prosecutors' remarks wrongly alleged that Ganesan's hyperbole was proof beyond a reasonable doubt.

(g) However, unlike *Floyd*, where the jury still acquitted Floyd of the most serious charges against him, here the jury wrongly convicted Ganesan on a count that had insufficient evidence and was eventually overturned on that basis by the State Appellate Court.

19. Prosecutors clearly attacked Ganesan's Sixth amendment right to confront a witness against him by repeatedly implying possession of evidence that they had but somehow could not produce at trial (buttressed further by their raising issue on Appeal: see Ganesan v. State, 45 S.W.3d 197, 203-204 and Petitioner's Rebuttal, page 5 of 45, Paragraph 8)

20. Ganesan deserves the same treatment as in *Floyd*: the 2nd Circuit remanded and granted a writ allowing the State to retry him within 90 days.

21. This Ground is further buttressed by another judge (Hon. Judge David Crain) ruling in a subsequent trial based on the same evidence, where the prosecutors' tried the same outrageous remarks. Judge Crain chastised the defense counsel for not requesting a mistrial soon enough, and he said he would have granted one very early in the prosecutorial tirade. Such **determinate proof** is rarely available in a habeas petition, and the record from this later trial (which have been preserved) would have been available had the Magistrate held an evidentiary hearing requested by petitioner.

22. The prosecutors deliberately and repeatedly conveyed the false impression to the jury that prosecutors had evidence showing if the jury found Ganesan guilty, he'd surely kill the two alleged victims.

23. The prosecutors' remarks prejudiced Ganesan's specific right that he be tried on the evidence presented to the court (Article 6, "... to be confronted with the witnesses against him, to be informed of the nature of accusation against him, tried by an impartial jury), i.e., the state denied Ganesan the benefit of a specific provision of the Bill of Rights. Further, defense counsel could not address the Prosecutions' closing remarks since defense does not get a rebuttal after final prosecution closing.

24. The malicious and inflammatory prosecutorial remarks, in the context of a solicitation case (**not** a murder case), coupled with the inference one can draw from the State Appellate Court reversal of one count, indicates that the jury was crippled in its ability to be a rational trier of facts, denying Ganesan of due process. This mandates a new trial (Menzies v. Procunier, 743 F.2d 281, 288-289; Sanders v. Lynaugh, 714 F.Supp. 834, 835-839). Each prosecutorial

misconduct alone might not justify a new trial, but the effect of all of them does (Floyd v. Meachum, 907 F.2d 347, 357).

GROUND 2 – Partial Reversal on a Dual Count Indictment

References:
Ganesan v. State 45 S.W. 3d 197, 204-207
Habeas Petition, Additional Memorandum,
Pages 11 - 19
Respondent's Answer, Pages 11-14
Petitioner's Rebuttal, Pages 7-10, 25, 26
Magistrate's Report, Pages 10-11

Magistrate's Contention:

25. (a) Ganesan does not make the legal basis of his claim clear, (b) the jury was correctly instructed, and (c) the jury entered separate verdicts as to guilt and sentence on each count.

Ganesan's Rebuttal:

26. The legal basis of the claim is the constitutional requirement that **each** element of **each** count must be proved beyond a reasonable doubt. When two or more offenses are joined for trial, three sources of prejudice are possible:

(1) The jury may confuse and cumulate the evidence and convict the defendant of one or both crimes when it could not convict him of either, if it could keep the evidence properly segregated (see Drew v. United States, 331 F.2d 85, 88; Wright, Federal Practice and Procedure § 222 at 437).

(2) The defendant may be confounded in presenting defenses, as where he desires to assert his privilege of self-incrimination with respect to one crime and not

the other (see Cross v. United States, 335 F.2d 937, 989-990; Moores Federal Practice § 14.03).

(3) The jury may conclude that the defendant is guilty of one crime and then find him guilty of the other because of his criminal disposition.

The record in this case clearly indicates both (1) and (3) are likely in the instant case.

27. The government normally argues that any prejudice resulting from such a joint trial is cured by instructions which require the jury to consider each offense and the evidence thereof separately. In the instant case, there was **no** such instruction, and furthermore there **was** an instruction specifically directing the jury to **link** the two offenses.

28. In other words, where there is "simple and distinct" evidence, a **properly instructed** jury can be trusted to separate the evidence properly. While this may be an appropriate standard for measuring the degree of prejudice resulting from the jury's confusion and accumulation of evidence, it does not address the greater harm where the jury, while limiting consideration of evidence to the crime to which it relates properly finds the defendant guilty of one crime but then considers that finding probative of his guilt of another (and in the instant case, the jury incorrectly found Ganesan guilty of charge one). It is highly probably that the jury, ignorant of one crime, would have acquitted on the other. (Paraphrased from U.S. v. Foutz, 540 F.2d 733, 736-739.)

29. Magistrate is incorrect in stating that Ganesan failed to show how allowing the spillover effect of a reversed count is "contrary to ... federal law" (Ex parte Mills, 795 S.W.2d 203, 204-05). In paragraphs 15, 16, 17 (page 7 of 45 of Petitioner's Rebuttal) Ganesan provides multiple Federal cases on the **need** for an instruction that the jury consider **each** count separately. No where in Magistrate's Mills cite is there an allowance for lack of such an instruction to **separate**

counts, and no where is there any hint of **allowing** the specific **linkage** of the acquitted count to the affirmed count. Hence, Magistrate's Mills cite is irrelevant to the instant case. Furthermore, Texas Penal Code § 3.02, Kinkeade & McCollough's 2002-2003 Edition, page 23: "When cases are consolidated, the court **must** instruct the jury that evidence of one offense is not evidence of another joined offense." [emphasis mine] The Charge to the Court does just the reverse.

30. From Cupp v. Naughten, 414 U.S. 141, 146-147, 94 S.Ct 396, 400,

> Federal courts considering habeas petitions have announced narrow guidelines for jury charge error that offends the Constitution. When reviewing a jury charge for Constitutional infirmity, we must consider the challenged portion of the charge not in "artificial isolation" but rather "in the context of overall charge."

31. In Justice v. Hoke, 45 F.3d 33, 34, a Constitutional violation occurs only if

> there is a reasonable likelihood that the jury understood the instructions to allow conviction on proof insufficient to meet the Winship standard (Victor v. Nebraska, 511 U.S. 1, 6, 114 S.Ct 1239, 1243).

Further, from Francis v. Franklin, 471 U.S. 307, 313, 105 S.Ct 1965, 1970 and Sandstrom v. Montana, 442 U.S. 510, 520-524, 99 S.Ct 2450, 2457-2459,

> [Winship] prohibits states from using evidentiary presumption in a jury charge that have the effect of relieving the state of its burden of presumption beyond a reasonable doubt of every essential element of a crime.

Also, Francis v. Franklin, 471 U.S. 307, 313, 105 S.Ct 1965, 1970 and Patterson v. New York, 432 U.S. 197, 215, 97 S.Ct 2319, 2329:

> Because the state must prove each element of the offense beyond a reasonable doubt, it may not shift the burden of proof to the defendant by presuming one element upon proof of the other elements of the offense.

32. Such a presumption is improper, if it removes the presumed elements from the case once the state has proved the predicate facts giving rise to the presumption or if it requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted. *(Sandstrom 442 U.S. at 517-518, 99 S.Ct at 2455-2456; Francis 471 U.S. at 314, 105 S.Ct at 1971 n.2)*

> Jury instructions on a presumption violate due process if a reasonable jury could have given the presumption conclusion or persuasion-shifting effect. *(Sandstrom 442 U.S. at 519, 99 S.Ct at 2456-2457)*

> Such a presumption is mandatory. *(Francis 471 U.S. at 314, 105 S.Ct at 1971)*

> In determining whether the presumption is mandatory, we must pay careful attention to the words actually spoken to the jury ... for whether a defendant has been accorded his Constitutional rights depends on the way in which a reasonable juror could have interpreter the instruction. *(Sandstrom 442 U.S. at 519, 99 S.Ct at 2456)*

> The legal effect to be given the presumption under the law is not, however, the issue. The point is whether the instruction inferred a reasonable juror that he was free to ignore the presumption. *(Sandstrom 442 U.S. at 516-517, 99 S.Ct at 2455-2461)*

33. In Rose v. Clark, 478 U.S. 570, 106 S.Ct 3101, the Supreme Court held that the harm analysis established in Chapman v. California, 386 U.S. 18, 87 S.Ct 824 applies to jury instructions that violates the principles of *Sandstrom* and *Francis*. *Chapman* requires the state, as **beneficiary** of the **Constitutional error** to prove beyond a reasonable doubt that the error **did not contribute** to Ganesan's conviction. Such proof is clearly **impossible** in the absence of **any** instruction that evidence of count one is not evidence of count two in this joined offense.

34. It is clearly inferential that, after and because of the Prosecutors' "death warrant" allegations, the jury would have found Ganesan "guilty" on all pieces of paper provided to them. So consideration of the jury entering separate verdicts is irrelevant against the issue of whether the jury charge asked the jury to weigh each count separately and find Ganesan guilty on beyond a reasonable doubt, **independently**, on each charge. Ganesan provided this Court with a copy of the Charge of the Court as an attachment to the Petitioner's Rebuttal, and it is unambiguous that no such separation instruction was given (see attached Charge of the Court).

35. Jury entry of separate verdicts under the circumstances is "de minimus" in importance, and it does not imply whether the jury decided each count separately or made an overall assessment. Further, the jury charge clearly asks the jury to use its determination of the acquitted charge in deciding the affirmed count (Instruction VII and Instruction VIII of the jury charge; attachment 5 of Petitioner's Rebuttal). **This**

necessitates a new trial, since the erroneous conclusion on charge one was used to decide charge two.

36. In Winship v. U.S., 90 S.Ct. 1068, 1073, the Supreme Court opined that "Due Process clause protects the accused against conviction, except upon proof beyond a reasonable doubt, of every fact necessary to constitute the crime with which he is charged." In Sandstrom v. Montana 442 U.S. 510, 512, 99 S.Ct. 2450, 2452, the Supreme Court opined,

> "the effect of a presumption in a jury instruction[or lack of it] is determined by the way in which a reasonable juror could have interpreted it, not by a state court's interpretation of its legal import .... The state was, thus, not forced to prove beyond a reasonable doubt ... every fact necessary to constitute the crime ... charged."

37. The single count, had it been tried by itself, would not have resulted in a conviction, since the strong corroboration of the inchoate offense would not have been supported by an 18 month earlier, temporally remote, extraneous evidence which was strongly renunciated.

GROUND 3 – Ineffective Assistance of Counsel

References:
Habeas Petition, Additional Memorandum,
Pages 20 - 35
Respondent's Answer, Pages 20-28
Petitioner's Rebuttal, Pages 18-23, 26-29
Magistrate's Report, Pages 13-17

Magistrate's Contention:

38. Ganesan must show his (a) counsel's act was unreasonable in light of all circumstances, absent counsel's deficiency, outcome would be different, (b) the resulting

prejudice made the whole trial fundamentally unfair, and (c) he must overcome broad deference given to counsel's strategic choices.

Ganesan's Rebuttal:

39. Ineffective assistance of counsel is a habeas ground invariably found in every habeas petition, since every convicted person who is appealing the conviction believes his attorney should and could have done more. This leads to an understandably harsh standard by the habeas court in determining such a claim. In this context, the instant case should be evaluated in light of two facts:

(1) Ganesan's trial counsel and appellate counsel were one in the same, and an appellate counsel is not going to bring "ineffective assistance of counsel" claim on himself (Camacho v. State, 65 S.W.3d 107, 108, 109-110; Wheat v. U.S., 486 U.S. 153, 108 S.Ct. 1692; Mickens v. Taylor, 122 S.Ct. 1237; Cuyler 100 S.Ct. at 1718). Further, a criminal defendant is entitled to assistance of counsel free from conflict of interest (Glasser v. United States, 315 U.S. 60, 75-76, 62 S.Ct 457, 467-468). Such entitlement is guaranteed by the Constitutions of Texas and of the United States, and this extends both to trial and to appeal (U.S.C.A Constitutional Amendment 6; Vernon's Ann. Texas Constitution, Article 1 § 10). Even more, such entitlement to protection is without distinction as to whether counsel is retained or appointed (Mickens v. Taylor, 122 S.Ct. 1237). The trial court has an independent duty to ensure that a defendant receives a trial that is fair and that does not contravene the Sixth Amendment aim of ensuring an effective advocate during trial and appeal. A defendant may waive the right to conflict free counsel, if the waiver is done knowingly and

voluntarily (no such waiver in the instant case was provided).

The record reflects that appellate counsel was appointed by the same Judge who presided over jury trial. Ganesan did not question his attorney's performance during trial or during appeal. Neither the Clerk's record nor the Reporter's record reveals that the potential conflict created by brief sought to be filed by Ganesan's counsel was disclosed to Ganesan or to the trial Judge. The record does not reflect a waiver of conflict by Ganesan. Clearly, Ganesan's Sixth Amendment rights were compromised at a minimum by the continued representation by the same defense counsel through the appellate process. Defense counsel, as appellate counsel, obviously would not raise an issue that might reflect negatively on his performance at trial. Hence, a greater scrutiny of Ganesan's claims is warranted.

"Actual 'conflict of interest' for Sixth Amendment purposes is conflict of interest that adversely affect counsel's performance" (Mickens v. Taylor, 122 S.Ct. 1237, 535 U.S. 162). In the same " ... apply needed prophylaxis in situations where the ordinary requirements of *Strickland* are evidently inadequate to ensure vindication of defendant's Sixth Amendment right to counsel."

The *Cuyler* standard (Cuyler 100 S.Ct. 1718), applicable when a criminal defendant alleges that counsel's performance was impaired by conflict of interest, differs substantially from *Strickland* standard, generally applicable to Sixth Amendment ineffective counsel claims. *Strickland* requires a showing that counsel's performance was deficient and that there is a reasonable probability counsel's error changed the result of the proceeding. *Cuyler*, on the other hand, permits a defendant who raises no objection at trial (and appeal in this case) to recover upon a showing that an actual conflict of interest adversely affected counsel's performance (Perillo v. Johnson, 205 F.3d 775, 781; Strickland 104 S.Ct. 2064-2069).

(2) After Ganesan was convicted on two felony counts and had one count reversed on appeal, Travis County bench warranted Ganesan on six class A misdemeanor charges of threats and violation of protection order, based on the same evidence as used in the felony trial. Ganesan had the same counsel, who corrected previous deficiencies, and this resulted in a jury verdict of "not guilty" in 35 minutes.

Contrary to most habeas petitions claiming ineffective counsel, the instant case has the property that when deficiencies were corrected, the above mentioned "not guilty" verdict resulted. It is difficult to imagine meeting the habeas test of *harm and a different outcome* more certainly than in the instant case!

40. Next, the deficiencies will be directly addressed:

(1) Vallabhaneni Tapes: Contrary to Magistrate's assertion, Ganesan clearly described what is on the tapes (page 15 of 67, Additional Memorandum of Petition). Further, Respondent has all the tapes, and Ganesan requested, as part of his Rebuttal to Respondent, that Respondent provide them for the Court through a request for an expanded record (Petitioner's Rebuttal, paragraph 94, page 35).

Magistrate argues that Ganesan did not give details of the charges in the Class A misdemeanor trial, but the case was cited, so Magistrate *could* have obtained this information, and he could do so more easily than incarcerated Pro Se litigant Ganesan. However, Magistrate did not do so, and this Court should have that information: all six charges concerned threatening conversations and a violation of a protective order.

In the misdemeanor trial, defense counsel played the entire tape, and this put the snippet played at the felony trial in proper context, resulting in a "not guilty" verdict. We remind the Court of the Rodney King trial – **snippets** of video tapes played on TV convinced most viewers of his **guilt**; the **entire** tape played to the jury ended with a **not guilty** verdict.

If there had been more damaging information on the tape, the Prosecution would have played it; there wasn't. Defense erred **very badly**. Ganesan has clearly rebutted the presumption that counsel's failure to play the entire tape was not a reasonable strategic choice.

Failure to play complete tapes by itself meets the "different result" criteria since in a later class A misdemeanor trial based on the same evidence, playing these tapes did result in a different verdict.

(2) Hammonds Tape: Magistrate is **incorrect** in saying that defense counsel should have played *additional* portions of the taped conversation between Ganesan and Hammonds (Magistrate's Report, page 15). The fact is, **none** of that tape was ever played to the jury (Petition, pages 21-22). Prosecutors knew there was **nothing** on those tapes supporting the preposterous allegation by Hammonds regarding a solicitation.

Prosecutor Casner stated that it was the responsibility of defense counsel to play the tape to the jury, but Respondent kept possession of the tape and let defense counsel hear it **once**. From Fitzgerald v. Estelle, 505 F.2d 1334,

> If competency of retained attorney's representation is so apparent that a reasonably attentive official of state [Casner] should have been aware of [Casner not only "should have been aware of," but by her own words was aware] and could have corrected it, state action requirement for Federal habeas corpus purposes is satisfied. [bracketed inserts are mine]

Part and parcel of this failure on the part of defense counsel is failure to aggressively seek the tape or a copy or a transcript of it. Ganesan **did** request (Petitioner's Rebuttal, page 35, paragraph 94) this Court obtain this tape through an *expanded record request*. There simply is **no** valid strategy in not presenting a piece of evidence that exonerates a client to a jury.

Had Ganesan had the opportunity to depose his counsel in an evidentiary hearing (requested in paragraph 95, page 35, Petitioner's Rebuttal), his counsel would have admitted this.

(3) Not Requesting a Renunciation Instruction: Magistrate **errs** in stating that Ganesan was not entitled to an instruction on the affirmative defense of renunciation as it pertains to the *Hammonds* solicitation (Magistrate's Report, pages 12-13). Ganesan contends there is ample evidence to support such a request for the *Prier* solicitation, but defense counsel became "gun shy" after prior erroneous overrulings by the Judge, so he failed to ask for one (Petition – Additional Memorandum, pages 22-23). Ganesan contends his "roll in the hay" (petition, page 23 of Additional Memorandum) response to Prier was a solid renunciation. Yet, still, no renunciation

instruction was given. The Magistrate ignored the "roll in the hay" statement. Although these are not exactly the words the Magistrate believes are required, any reasonable person understands that, in the context of the few comments that might have the appearance of solicitation made earlier, "roll in the hay" and the Magistrate's statements **are equivalent.** Even if Magistrate believes the renunciation was not strong enough, **this is** for the jury to decide. But without **any** instruction as to renunciation, including the details of the law, the jury is not able to decide. A defense is **entitled** to any jury instruction supported by evidence, and it is clear from the record that such a request was highly meritorious, yet defense counsel failed to make it. Had such an instruction been given, there would have been no case since renunciation is a statutory defense (Texas Penal Code § 15.04).

Magistrate also claims that the Texas statute allows renunciation only for the criminal solicitation. But Ganesan argued in his Rebuttal to Respondent, paragraph 44, that if A (solicitation) and B (strong corroboration) are both needed for C (conviction) then both are part of the alleged crime and both are available for renunciation. Suppose Ganesan had allegedly talked with someone before talking to Hammonds. Then the State would have charged him with solicitation of Hammonds, and THEN, according the Magistrate's thinking, the Hammonds discussion would have met the renunciation requirement.

(4) Remuneration: A very important element of proof in a "hire for kill" crime is remuneration. Prosecutors offered **no** proof through testimony of Hammonds and Prier that there was ever any mention of remuneration. Ganesan did keep an emergency

amount of Traveler's Checks and cash which he got at his mother's death in 1992, and this money would allow him to visit his sister in India in an emergency. Prosecutors obtained the money and Traveler's Checks through a search warrant of Ganesan's home and presented it to the jury as "proof of remuneration." But all they proved was that he had money in his house; they offered no testimony from any witness that there was ever any mention of remuneration. In the interests of completeness, Ganesan directs the Court to Magistrate's mention of $106,000 cash taken from Ganesan's house by his bankruptcy attorney (Magistrate's Report, page 7). Magistrate does not mention this as possible remuneration, nor did the Prosecution, but in the absence of the trial transcript, this Court may wonder. In fact, as was stated at the trial that this was for attorneys' fees.

A court order on American Express with the Traveler's Check numbers would verify Ganesan's claim, so a lie by him would be easy to show. Ganesan, through his caretaker, has tried to get specific information from the Travis County District Attorney's office regarding where these Traveler's Checks are kept so that a request could be made to American Express for date details. To date, the DA's office has said, "Call the County Clerk," the County Clerk has said, "Call the Judge's Clerk," and the Judge's Clerk has said, "Call the DA's office," who the second time said, "Get a lawyer." Meeting the Magistrate's requirements is beyond the power of this Pro Se litigant. The cash has a band around it with the First Interstate Bank logo. Interstate Bank records would show Ganesan closed this account in 1992, two years before Ganesan met Vallabhaneni. Again, silence from the DA's office regarding this evidence makes obtaining proof of this by Ganesan impossible. Subsequent to the trial, defense counsel admitted to Ganesan that he erred in not pursuing this. Had Ganesan had the opportunity to depose his counsel in an evidentiary hearing (requested in paragraph 95, page 35, Petitioner's Rebuttal), his counsel would have admitted this. Further, (Petition – Additional Memorandum, page 24, paragraph 4) Ganesan stated defense counsel should have subpoenaed both American Express and Interstate Bank to verify the above, eliminating prosecutions only remuneration evidence.

(5) Wrong Conclusion: Magistrate is once again **incorrect** in his assessment of defense counsel's argument on extraneous evidence. The Texas Appellate Court clearly noted "Appellant does not argue that Court reached the wrong conclusion after applying the balance test. Instead, Appellant argues that the Court failed to apply the proper test at all" (Ganesan v. State, 45 S.W.3d 197, 204, left column, paragraph 3, last 4 lines). A review of the extraneous evidence shows it overwhelmingly supports exclusion rather than inclusion. Failure to make such an argument is plain error on defense counsel's part. Further, (Magistrate's Report, page 11-12), Magistrate cites Givens v. Cockrell, 265 F.3d 306, 308 (5th Cir. 2001) "... erroneous evidence ... justifies habeas relief only when the evidence is crucial." Ganesan agrees. The Appellate Court ruled that the Hammonds testimony **was crucial** and without it conviction was not possible. Also, when the Magistrate discusses the balancing test, he fails to comment on the cites by Ganesan that the *Judge* must articulate on the record (U.S. v. Zabaneh, 837 F.2d

1249, 1264) her decision, but the Judge chose the position "it was for the jury to do so" (See Rebuttal to Respondent, paragraphs 37, 38).

(6) Mr. Garcia: Hammonds had only one conversation regarding alleged solicitation with Ganesan. Magistrate (Magistrate's Report, page 5) mentions two other conversations, but as Magistrate's Report shows, only during the one in the Austin City jail does Hammonds claim any solicitation. That discussion took place well past **1 am** in the morning, in the presence of a witness, Mr. Garcia of Brady, Texas. Mr. Garcia was, per Hammonds's testimony, punch drunk *when he was arrested at **2 pm***. More than 12 hours later, when the discussion took place, Mr. Garcia would have substantially sobered up, negating Magistrate's comment in the footnote 2, page 16 (Magistrate's Report). Defense counsel clearly failed to produce a key witness and Ganesan had requested (Expanded Record, Petitioner's Rebuttal, Page 35, Paragraph 95) an evidentiary hearing to obtain Mr. Garcia's testimony. Hammonds's testimony of one jail house conversation in which a deal was struck between strangers but which was renunciated at the next available opportunity simply does not meet the "smell" test of any reasonable trier of fact, and Garcia's testimony as to the true nature of that first conversation would have cemented this fact.

(7) Disqualification: In countering "Recusal" on page 12 of his report, the Magistrate argues that without specific identification of bias, the claim is false. It is impossible to get inside someone else's mind, so identification of bias is never possible. But Ganesan **does** cite numerous times when he believes the Judge ruled wrongly, and the total collection of all

of these can easily be attributed to bias. Magistrate suggests no bias because he agrees with the judge's rulings; but claiming that such agreement implies no bias fails argumentation taught in Logic 101.

The trial judge, in her final weeks of pregnancy, made numerous errors and many close calls. A different jurist ruled differently on the same evidence (Petition – Additional Memorandum, Ground 7, pages 42-45). Defense counsel was in great distress over rulings and wrongful overrulings by the Judge. Appellate Court buttressed his sentiments when it overturned one of the charges. Ganesan contends his lawyer should have filed a motion to have the judge disqualified. Trial counsel, who also functioned as Appellate counsel, had but did not take two further chances to request disqualification through his motions to rehear and through the petition of discretionary hearing, both of which he filed. Judicial disqualification is a jurisdictional issue which can be raised at any time in the appellate process under Texas law. The Magistrate implies that a motion for disqualification would be frivolous since the Magistrate does not have a problem with the Judge. But just because the Magistrate has no problem with the Judge, effective counsel **should still** file such a motion if defendant **had** a problem. Good counsel does not mean counsel that only acts according to what the Magistrate concluded; good counsel **acts in the interests of the client**. Defense / appellate counsel simply failed to file the motion, yet when another jurist in the misdemeanor trial ruled differently from the trial judge, the result was "not guilty."

(8) Failure to testify: Ganesan was not aware of the incurable presumption in the jury's mind regarding

his silence. Ganesan wanted to testify, and he was the only person **(absent Mr. Garcia) who could counter Hammonds's testimony regarding the jail house discussion**. This allowed the Hammonds testimony to be unchallenged corroboration. Ganesan recognized this and testified during the punishment phase, against his counsel's wishes, and Ganesan believes he influenced the jury's perception through his testimony. Unfortunately, the damage had been done. Prosecutions' escalating, outrageous conduct had sufficiently infected the jury that allowing Ganesan to testify would do no further harm. The *need to rebut Hammonds's testimony was clear*, and defense badly erred in assessing the situation and convincing Ganesan not to testify. "Only such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make" (Wainwright v. Sykes, 97 S.Ct. 2497, 2510 n 1, Judge Burger Concurring). Also, from United States v. Curtis, 742 F.2d 1070, 1072, 1076,

> When a defendant asserts that he desires to exercise his Constitutional right to testify truthfully, counsel's duty is to inform defendant why he believes that course would be unwise or dangerous, and if defendant insists on testifying, however irrational that insistence might be from a tactical viewpoint, counsel must accede; defendant's personal Constitutional right to testify truthfully in his own behalf may not be waived by counsel as a matter of trial strategy.

Finally, from Wright v. Estelle, 572 F.2d 1071, 1077-1080,

> Judge Goodbold dissenting from the majority decision which assumed the existence of a personal Constitutional right to testify for the purpose of applying a harmless error analysis to the denial of that right, concluded the right to testify in one's own behalf also is of Constitutional dimension, is personal to defendant and may not be waived by counsel under the rubric of trial strategy.... The wisdom or unwisdom of defendant's choice does not diminish his right to make it.

For a recent detailed discussion on this personal Constitutional right, see Brown v. Artuz, 124 F.3d 73, 76-80:

> If defense counsel refused to accept defendant's decision to testify and would not call him to the stand, counsel would have acted unethically to prevent the defendant from exercising his fundamental Constitutional right to testify. Alternatively, if defense counsel never informed the defendant of the right to testify and that the ultimate decision belongs to the defendant, counsel would have neglected vital professional responsibility of ensuring that the defendant's right to testify is protected and any waiver of that right is knowing and voluntary.

This summarizes the instant case correctly. The resulting harm is clear. Ganesan, absent Garcia, was the only one who could refute Hammonds's testimony.

41. In summary, defense counsel came with a theory that there was insufficient evidence to support conviction, and, as the trial record indicates, this belief kept them from acting as an advocate and champion of client Ganesan in vigorously undermining the Prosecutors' case.

> Although *Strickland* standard for ineffective assistance of counsel is difficult to meet, this court is also mindful that the defendant is entitled to more than just a warm body standing next to him during the criminal process; he or she is entitled to reasonably effective legal assistance (U.S. v. Kladouris, 739 F.Supp 1221, 1227)
>
> As the American Bar Association standards for criminal justice provide, defense counsel should conduct a prompt investigation of circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and penalty in the event of conviction. The investigation should include efforts to secure information in the possession of prosecution and law enforcement authorities (U.S. v. Russel, 221 F.3d 615, 620).

Viewed in total, counsel's performance was so deficient that counsel was not providing representation guaranteed by the Sixth Amendment, and Ganesan paid the price.

GROUND 4 – Sufficiency of Evidence

References:
- Ganesan v. State 45 S.W. 3d 197, 200-204
- Habeas Petition, Additional Memorandum, Pages 36 - 44
- Respondent's Answer, Pages 14-17
- Petitioner's Rebuttal, Pages 10-14, 29-30

Magistrate's Report, Pages 4-8

Magistrate's Contention:

42. For writ to issue, Ganesan must prove that the Appellate Court's finding was based on "unreasonable determination of facts in light of the evidence presented" and that Ganesan has failed to meet this heavy burden.

Ganesan's Rebuttal:

43. Ganesan was indicted and convicted on two counts for the inchoate offense of solicitation of murder, distinct from murder or attempted murder. The Constitutional burden of proof is that every element of each count must be proved beyond a reasonable doubt (Texas Penal Code § 2.01). The jury was simply unable to do this because of the outrageous, unlawful conduct of the Prosecutors and the inadequate relief in this matter given by the Judge. Given that one count was overturned, the evidence must be reviewed, in a light most favorable to the jury's remaining verdict.

44. The Appellate standard of giving equal weight to countervailing and supporting evidence may have a greater bearing (given the reversal of count one), and, if circumstances equally support guilt or innocence, the conviction is reversed (U.S. v Giraldi, 86 F.3d 1368). Ganesan was convicted under Texas Penal Code § 15.03 (see Magistrate's Report, Page 4). The elements that need to be proven, beyond a reasonable doubt, under this statute are:

(1) a person
(2) with intent that murder be committed
(3) requests, orders, or commands
(4) another (person)
(5) to engage in specific conduct.
(6) Circumstances surrounding conduct, as the actor would believe them to be, would constitute murder or make the other person a party to murder.

Texas Penal Code § 15.03(b) defines the conditions required for conviction:

- (1) Uncorroborated testimony, and
- (2) Circumstances strongly corroborative of both the
  - (a) solicitation and
  - (b) actor's intent that other person act on solicitation.

Texas Code of Criminal Procedure Article § 38.14 requires

- (1) accomplice testimony and
- (2) corroborating evidence that
  - (a) tends to connect defendant with the offense committed and
  - (b) corroboration must show more than merely the commission of the offense.

Texas Criminal Code of Rules and Procedures § 38.17 requires for conviction

- (1) two witnesses or
- (2) one witness with corroborating circumstances.

45. Reasonable jurists have opined, repeatedly, regarding their view of the Legislative intent behind "strong corroboration" as specifically mentioned in a "solicitation" context in Texas Penal Code § 15.03(b) versus generic corroboration requirements under Texas Criminal Code of Rules and Procedures § 38.14 and § 38.17. Petitioner included this in his Petition – Additional Memorandum, pages 36-38.

46. Texas Appellate Court opined in Ganesan v. State, 45 S.W.3d at 204,

> The evidence of motive, the veiled threat during the telephone conversation and earlier solicitation of Hammonds, adequately corroborates Prier's testimony both as to Appellant's solicitation of Vallabhaneni's murder and Appellant's intent that Prier act on the solicitation.

Ganesan and his attorneys have contested this assertion through all proceedings in this case. Appellate Court also opined in Ganesan v. State at 205, footnote 3,

> Prier's credibility was the principle issue at trial, both factual and legally. Hammonds's testimony was crucial to the State; without it, it is unlikely that Prier's testimony regarding the solicitation of Vallabhaneni's murder would have been adequately corroborated.

47. Ganesan argued in both his Petition and his Rebuttal to Respondent, and Magistrate seems to concede, that the only evidence in support of the inchoate offense of solicitation was the extraneous evidence of Hammonds.

48. We examine the nature of this extraneous evidence:

(1) It was temporally remote by 18 months from the instant offense.

(2) It was from a career convict reporting on a jailhouse conversation.

(3) It made the preposterous allegation that the entire deal was "signed, sealed and delivered" during one conversation with a total stranger.

(4) There was no mention of remuneration.

(5) Hammonds said, in both direct and cross examination, that it was voluntarily completely renunciated by Ganesan before the commission of any act by Hammonds.

We now examine the need for strong corroborating evidence to the elements that constitute Texas Penal Code § 15.03:

(1) A person -- it corroborates "Ganesan as the Actor."

(2) With **intent** that murder be committed – There is nothing in Hammonds's testimony that Ganesan intended the commission of this act. On the contrary,

there is ample evidence that he was ranting hyperbole as a frustrated citizen whose life's work and savings were being destroyed by an alien committing fraud (Ganesan v. Vallabhaneni, et al, 02 CA-00614, now in 5th Circuit, Case No. 03-50193; Ganesan v. U.S. Attorney, et al, 03-CA-00030, now in 5th Circuit, Case No. 03-50519). Ganesan offered no remuneration to Hammonds or Prier. The existence of whatever wealth he had has **no bearing** on any intention of whether he wanted to use any money for any solicitation. Even in light most favorable to the verdict, such an inference would be the **creation** of corroborating evidence rather than evaluation of corroborating evidence. This was so affirmed by the State Appellate Court, Ganesan v. State, 45 S.W.3d at 203 [13].

(3) Requests, orders, or commands – Prier stated she was asked by Ganesan to hire somebody to kill. Hammonds stated he was being hired by Ganesan to kill. Hiring somebody to kill does not support asking somebody else to kill. At most, it is a suggestion that the Prier discussion might have occurred; it does **not** corroborate that it did, and it isn't **even close** to strong corroboration.

(4) another person – Hammonds or somebody Prier was going to find.

(5) to engage in specific conduct – Hammonds testified Ganesan wanted "somebody to talk to Vallabhaneni." That is the **specific conduct**. "Talk to" is not corroboration of "find somebody to kill." Ganesan was in jail for talking on the phone to Vallabhaneni in violation of a protective order, and he wanted somebody to **talk** to Vallabhaneni. The event must be evaluated as to its corroboration; it cannot be evaluated as an inference to create corroboration.

Add to this, Hammonds admission of Ganesan's renunciation to him. Further, Prier admitted that her "play acting" was on her part, and Ganesan's dismissal of her alleged meeting with an accomplice as a "roll in the hay" is clear evidence that he had no intention of her "so acting." Obviously, the notion of hyperbole and frustrated ranting by Ganesan is at least as valid as any conclusion of solicitation.

(6) Circumstances surrounding conduct, as the actor would believe them to be, would constitute murder or make the other person a party to murder – Ganesan is alleged to have solicited Hammonds in jail, but Ganesan made no allusion to it in any subsequent conversation with Hammonds. Ganesan is further alleged to have asked Prier to find someone to kill, but he dismisses her "purported meeting with an accomplice" as a 'roll in the hay," as she testified. She testified to play acting, with no prompting by Ganesan. Again, if we search for corroboration rather than an *implied* corroboration, we find only hyperbole and frustrated ranting, which is commonly done every day by people everywhere. Prosecutor Mange's comments to the Judge that he believed the jury expected him to dismiss the case influenced the trial judge to allow this evidence, but another judge in a later trial disallowed this same evidence. The subsequent verdict, including the count that was overturned by Appellate Court, is **strong** evidence that the jury's attention was distracted by this extraneous evidence.

49. "Sufficiency of evidence is determined based upon the substantial elements of the criminal offense as defined by state law" (Alexander v. NcCotter, 775 F.2d 595, 598). The elements of intent, engagement in specific conduct (as required by Texas Penal code § 15.03(a)), circumstances

strongly corroborative of both the intent and that the other person act per the solicitation (as required by Texas Penal Code § 15.03(b)) are not demonstrated by the evidence. Any rational trier of fact, as this jury was before the prosecutors' misconduct, would laugh at the evidence and expect the prosecution to dismiss the case. In King v. Collins, 945 F.2d 867, 868, the 5th Circuit reversed and granted writ for reasons identical to the instant case, namely insufficient evidence as regard to knowledge of specific conduct and intent. The Constitution, Supreme Court precedent, Federal case law, and conduct of another jurist and jury make the case for Ganesan. Given the above analysis, reasonable jurists would agree that there was no corroboration, let alone the statutorily required **strong** corroboration.

GROUND 5 – Non-Criminal Solicitation

References:
Ganesan v. State 45 S.W. 3d 197, 200-201
Habeas Petition, Additional Memorandum,
Pages 45 - 49
Respondent's Answer, Pages 14-17
Petitioner's Rebuttal, Pages 13-14, 30
Magistrate's Report, Pages 8

Magistrate's Contention:

50. Under Texas law, a person commits solicitation if he requests another to engage in conduct that would make the other party a felon.

Ganesan's Rebuttal

51. Texas Penal Code Ann. § 15.03(a) states that a person commits an offense if, with intent that a capital felony or felony of the first degree be committed, he requests, commands, or attempts to induce another to engage in

specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission. In other words, elements that need to be proven beyond a reasonable doubt are intent to commit a crime and substantial steps beyond mere preparation towards committing the crime.

52. It is undisputed that Ganesan did not ask Prier to kill either Vallabhaneni or Wright. Prier testified that Ganesan asked her to find someone to do so. No evidence was introduced or even hinted at to suggest that this was a completed attempt as an essential element required for proof beyond a reasonable doubt.

53. Prier gave no testimony that Ganesan agreed to pay for a killing, nor did anyone else so testify. The element is another essential element of proof beyond a reasonable doubt. A careful review of the record shows, at worst, Ganesan asked Prier to find someone to kill Wright and Vallabhaneni. But the record also clearly shows that he did not believe that Prier was acting in furtherance of this, and Prier, by her own admission, was just acting to go along with what she thought Ganesan wanted. The maximum that can be inferred from the record is that "Ganesan **attempted** to get Prier to find somebody to kill Amy Wright and Vallabhaneni" which under Texas Penal Code Ann. § 15.05 is not a crime (see McCravy v. State, 642 S.W.2d 450, cited in paragraph 35 of Rebuttal to Respondent, which differentiates between a crime and an attempted crime). Finally, Garber v. State, 671 S.W.2d 94, 98-100, requires a clear indication in the Appellant's mind that an actual solicitation has taken place. In the instant case, the dual renunciations clearly indicate otherwise.

GROUND 6 – Extraneous Offense

References:

Ganesan v. State 45 S.W. 3d 197, 204-205
Habeas Petition, Additional Memorandum,
Pages 50– 54
Respondent's Answer, Pages 25-26
Petitioner's Rebuttal, Pages 23-24, 31
Magistrate's Report, Pages 11-12

Magistrate's Contention:

54. Erroneous admission of evidence warrants habeas relief only when evidence is crucial, critical, and highly significant. Further, the admission of such extraneous evidence results in an "unfair" trial if, absent the extraneous evidence, the result would have been different.

Ganesan's Rebuttal:

55. The record shows that the trial judge refused to make a ruling on the record of her findings on the balance test, and she wrongly asserted that it was for the jury to do so. Another jurist, presiding over a related trial based on the same evidence refused to let the extraneous evidence in. Magistrate would have been provided with the entire transcript of that trial had he responded to Petitioner's request for appropriate discovery and evidentiary hearings (Petitioner's rebuttal, pages 35-36).

56. Hammonds and Prier were from different walks of life. Hammonds testified that in one meeting, in a jailhouse conversation 18 months before the instant offense, without any talk of remuneration, Ganesan completed the act of solicitation. Hammonds also testified Ganesan completely renunciated this at the next available opportunity. Prier, on the other hand, testified that Ganesan solicited her, but any discussions in furtherance of it were "acted up" by her on her own initiative.

57. The record overwhelmingly supports that the Hammonds extraneous evidence was a major factor in convincing the jury that Ganesan was a "bad character" who solicits complete strangers to kill. But analysis of the evidence balancing test (Petition – Additional Memorandum, Pages 50-54) overwhelmingly proves the evidence was wrongly admitted.

58. That it was crucial, critical, and highly significant, as required according to the Magistrate, was affirmed by the State Appellate Court. Magistrate's second requirement, that absent the extraneous evidence, the result would have been different, is also affirmed by the State Appellate Court, Ganesan v. State, 45 S.W.3d 197, 205 footnote 3:

> Prier's credibility was the principle issue at trial, both factually and legally. Hammonds's testimony was crucial to the State; without it, it is **unlikely** that Prier's testimony regarding the solicitation of Vallabhaneni's murder would have been adequately corroborated.

59. The admission of a 18 month temporally remote, extraneous evidence from a repeat felon, which the felon admits was renunciated at the next possible opportunity, is the sole "strong corroboration" of the inchoate offense and warrants a habeas writ (U.S. v. Beechum, 582 F.2d 915; U.S. v. Zabaneh, 873 F.2d 1249, 1265; U.S. v. Carter, 516 F.2d 431; U.S. v. Robinson, 700 F.2d 205, 213). In *Beechum*, which is similar to the instant case, evidence was disallowed because evidence was completely dissimilar except for the common element of intent. The only commonality between Hammonds and Prier in the instant case is the alleged *intent* of solicitation. In *Carter*, a similar temporal remoteness depreciated the probity of the extrinsic evidence. In *Zabaneh*, time and volume of testimony, similar to the instant case, led to reversal.

60. A re-examination of unfair prejudice follows. The term "unfair prejudice" as applied to a criminal defendant speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground **different** from proof specific to the offense charged. The jury came to its decision on the improper basis of emotion by generalizing the defendant's **one** earlier bad act (a renunciated one) into "bad character." They took that as raising the odds that he did the later bad acts, and handed down a preventive conviction per the prosecutors' misconduct claims, even if he were innocent this time. Although propensity evidence is relevant, when there is risk that a jury will convict for crimes other than those charged, or that uncertain guilt will still get a conviction, the prejudicial effect outweighs it as admissible evidence.

61. The above was paraphrased from Old Chief v. U.S., 117 S.Ct. 644, and it applies to the instant case exactly. Ganesan's conviction should be reversed and remanded for the same reason as in *Old Chief.* It is clear the State Court arrived at a conclusion opposite to that of the Supreme Court on a set of identical issues.

62. The Hammonds evidence simply should not have been allowed. Again, in a subsequent trial between the same parties on related charges using the same evidence, a different jurist (Hon. Judge David Crain) simply would not allow this same extraneous evidence.

63. In Story v. Collins, 920 F.2d 1247, 1254, 5th Circuit opined,

> An extraneous evidence may be admitted into evidence without violating the due process claims, if the government makes a "strong showing that the defendant committed the offense and if the extraneous evidence is rationally connected with the offense charged

citing Enriquez v. Procunier, 752 F.2d 111, 115 (5th Circuit). The extraneous evidence in this case is a lifelong convict reporting on a jailhouse conversation of a preposterous claim of a “signed, sealed, and delivered” solicitation, made in one conversation without any discussion of remuneration, and which Ganesan renunciated immediately. Where is the “strong showing?”

64. Prejudice overwhelmed probity by a wide margin, and as another jurist ruled, the evidence should not have been allowed, and there would have been no conviction for lack of corroboration, let alone strong corroboration required by Texas Penal Code § 15.03(b).

GROUND 7 – Judicial Disqualification

References:

Habeas Petition, Additional Memorandum;
    Pages 55 - 58
Respondent’s Answer, Pages 18 – 19
Petitioner’s Rebuttal, Pages 15, 31 - 32
Magistrate’s Report, Pages 12

Magistrate’s Contention:

65. Ganesan has not identified any specific bias which resulted in harm to him during his trial. The Habeas Court has found no improper rulings. Ganesan is close to claiming women are too emotional to act as judges (antediluvian thinking).

Ganesan’s rebuttal:

66. Ganesan takes strong exception to any reference by the Magistrate as to Ganesan’s characterizing women as too emotional to act as judges and requests the Court to completely remove them from the record. Ganesan would not want to prejudice any member of the judiciary (male or

female) by any meaning which the Magistrate has chosen to infer. Magistrate suggests that Ganesan's concern for mixing emotional content of pregnancy with domestic content of the trial is antediluvian. Ganesan understood he might be so characterized, so he added a hypothetical example of a judge suffering from prostate cancer ruling on a case involving PCB caused cancer. Ganesan asked the members of the Court to consider if they, as defendant, would want such a situation (page 55, Additional Memorandum). Magistrate did not comment because Magistrate knew he would answer "no." Further, in his petition (page 56, Additional Memorandum), Ganesan cited "The interest which will disqualify a man from trying a case depends on circumstances and relationships" (In Re Murchison, 75 S.Ct. 623, 349 U.S. 133) obviously also applies to a woman.

67. It is uncontroverted that the trial judge was in the final weeks of pregnancy and was experiencing significant discomfort. Contrary to Magistrate's claim, Ganesan **did** assert specific bias by the Judge that resulted in harm throughout his habeas petition. To the best of Petitioner's knowledge, there is no direct Supreme Court case based on this issue. However, there are well established Federal case laws and standards in this regard.

68. The first test is the habeas test of harm and the resulting prejudice (Wabesha v. Solem, 649 F.2d 155, 159). The trial Judge actively and fully participated in both the guilt / innocence and punishment phases. Her many rulings, which resulted in an adverse ruling, include::

> (1) Overruling a defense objection and putting a judicial stamp of approval on outrageous prosecutorial conduct, and allowing Prosecutors to repeat this conduct.
>
> (2) Not ruling on a balance test and wrongly ruling that it was for the jury to do so.

(3) Not providing a crucial renunciation defense instruction.

(4) Allowing extraneous evidence which another jurist did not permit.

(5) Not providing a severance instruction in the jury charge and wrongly instructing the jury to link the affirmed count to the acquitted count.

(6) One of the counts at trial was reversed on appeal. Ganesan notes that the State Appellate Court opined that many of the judge's decisions were "close." As to resulting harm, a conviction and 10 year sentence is harm. If this is insufficient harm, Petitioner cannot imagine what harm would be needed for habeas relief.

69. The issue in dispute is not a woman's competence as the Magistrate tried to make it, but a *pragmatic* one: was the Judge too infirmed from a pregnancy with twin girls and the ill-understood impact it has on a person's judgment? The second Federal habeas standard is the one opined in Matter of Hipp, Inc., 5 F.3d 109, 111 (5th Circuit). "Disqualification of a judge is appropriate if reasonable person, knowing all relevant circumstances, would harbor doubts about the judge's impartiality." Subsequent to this trial, Ganesan asked over 100 women from all walks of life – lawyers, doctors, engineers, secretaries, correction officers, assistant wardens, nurses, etc. He has yet to find a woman who has said "Yes, under the circumstances, I'll sit in judgment of an important criminal trial." The overwhelming response is, "No, I would have let another judge take over or postponed the trial." The Judge's close calls and erroneous decisions led to a harmful verdict. Reasonable jurists clearly debate her calls: another jurist, not suffering the same infirmity, ruled differently from this judge on every issue, leading to a "not guilty" verdict in a subsequent trial. If there **any chance** that the Judge's condition might in **any way** prejudice the trial *Matter* requires disqualification.

70. That the issue deserves further encouragement is buttressed by the absence of any clear rule on when a pregnant judge should start abstaining herself and by the rising number of female members of the judiciary. In other mission critical and life threatening occupations where unerring judgment is critical (the Federal government, Armed Forces, Air Traffic control, etc.) at a minimum, abstention is mandated in the third trimester. Surely a jury trial which resulted in 10 years of depravation of freedom, deserves the same consideration.

71. Ganesan strongly resents the Magistrate's suggestion Ganesan is anti-women. This suggestion is designed to inflame the District Judge and other Circuit Judges who might read his opinion, and Ganesan asks the Court to rule **only** on the question, "Could the Judge's condition of being within days of term have contributed to adverse rulings and a resultant adverse outcome?" Given the overturning of one count and the rulings of another jurist in another related case with the same evidence, it is highly likely that with a different judge the result would have been different.

GROUND 8 – Renunciation Defense

References:

Ganesan v. State 45 S.W. 3d 197, 205
Habeas Petition, Additional Memorandum,
Pages 59 - 63
Respondent's Answer, Pages 19 - 20
Petitioner's Rebuttal, Pages 16 – 17, 32
Magistrate's Report, Pages 12 – 13

Magistrate's Contention:

72. Ganesan does not prove that the ailing instruction, by itself, so infected the entire trial that the resulting conviction violated due process. Further, any harm resulting from the

absence of the instruction only affects the Hammonds solicitation, but Ganesan was on trial for soliciting Prier.

Ganesan's Rebuttal:

73. The Supreme Court opines the "a defendant is entitled to an instruction as to any recognized defense for which there exists sufficient evidence for a reasonable jury to find in his favor" (Mathews v. U.S., 108 S.Ct. 883, 485 U.S. 58; Stevenson v. U.S., 16 S.Ct. 839, 162 U.S. 313). This opinion is directed toward the defense theories, **not** toward the nature of the evidence as to whether it is corroborative of the instant offense or is of the instant offense.

> In answering the question vis a vis the issue of whether the instruction should have been given allowing the jury to consider the defense thus raised, we must accept the testimony **most favorable** to the defendant.... [The crucial question then is whether] there was an underlying foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. *(United States v. Lewis, 592 F.2d 1282, 1286)*
>
> A defendant is entitled to a jury instruction on a defense theory, if the theory has a basis in law and in the record. *(United States v. Hayes, 794 F.2d 1348, 1350)*
>
> An instruction on the theory of the defense must be given if there is evidence upon which the jury could rationally sustain defense. *(United States v. Jackson, 726 F.2d 1466, 1468)*
>
> Defendant is entitled to have presented instructions relating to the theory of defense for which there is any foundation in the evidence, even though the evidence

> may be weak, insufficient, inconsistent, or of doubtful credibility and even though the sole testimony in support of the defense is the defendant's testimony. *(U.S. v. Young, 464 F.2d 160)*

74. The record is uncontroverted that the renunciation of the Hammonds solicitation was voluntary, complete and prevented commission of the offense, and this was confirmed by Hammonds in both direct and cross examinations. The record further establishes that Ganesan dismissed Prier's purported meeting with an accomplice as a "roll in the hay" and Prier testified that "she was play acting."

75. It is also uncontroverted, and in fact it was opined by the Texas Appellate Court, that the Hammonds solicitation was essential and vital without which "strong corroboration" for the instant offense could not have been established (Texas P.C. § 15.03(b); Texas P.C. § 15.04; Ganesan v. State. 45 S.W.3d 197, 205).

76. The defense theory was that Hammonds's solicitation was completely renunciated; hence, it buttresses the evidence of renunciation of the instant offense and, further, it removes the strong corroboration proof required of the instant offense. The essence of due process and equal protection is fair trial. Had the instruction been given, the jury would have dismissed the instant offense for lack of strong corroboration, or for the affirmation of the renunciation of the solicitation of Prier due to "pattern behavior" (the very theory the jury likely used to convict), or both.

77. The key fact to remember is that the emphasis is directed toward **defense theories** and not toward the characterization of whether the instruction is directed toward the primary evidence or the corroborative evidence.

78. The State Appellate Court **incorrectly applied** clearly established Federal case law and came to the objectively unreasonable conclusion when it opined, "[Petitioner] was on

trial for soliciting Prier. Hammonds's testimony did not raise the issue whether appellant countermanded his solicitation of Prier." But the same logic would also say Hammonds's testimony did **not raise** the issue of solicitation of Prier. Rather, Hammonds was being used to establish **pattern behavior**, and as such his testimony just as easily implies renunciation as it does solicitation. But without a renunciation instruction, the jury is **not informed** that they can consider it as such.

79. Furthermore, the trial court has no discretion to discredit a defense theory regardless of how feeble or contradictory the court may view it. That is for the jury to decide. The operative issue is simply, "was there enough evidence to justify the request?" It is a fundamental violation of due process when a court denies a defendant an instruction that would eliminate the **strong** corroboration of the main witness for the prosecution, because **strong** corroboration is one of the elements that **must** be proven under Texas law (Texas P.C. § 15.03(b). Defense is **entitled** to an instruction that counters such provability.

80. The decision was clearly contrary to the Supreme Court decision (Cabana v. Bullock, 106 S.Ct. 689, 456 U.S. 107) that clearly sates,

> Defendant charged with a serious crime has the right to have a jury determine his guilt or innocence, and a jury's verdict cannot stand if the instruction provided the jury do not require it to find each element of rime under proper standard of proof.

Further, this decision was clearly contrary to Francis v. Franklin 105 S.Ct. 1965, 471 U.S. 307 where Supreme Court held,

> Due process clause on the 14th Amendment protects accused against conviction except upon proof beyond a reasonable doubt on every fact necessary to

> constitute crime with which he is charged; forgoing Constitutional principle prohibits states from using evidentiary presumption in a jury charge that has the effect of relieving the sate of its burden of persuasion beyond reasonable doubt of every essential element of the crime.

81. The evidentiary presumption was on the Hammonds testimony as "corroborative." It removed from the state's burden of proof the statutorily mandated "**strong** corroboration." Prosecution was allowed to use marginal, temporally remote, extraneous evidence for the purposes of strong corroboration (Ganesan v. State, 45 S.W.3d 197, 205). But defense was denied a renunciation defense instruction on a defense theory, raised by the same evidence (Ganesan v. State, 45 S.W.3d 197, 205) that went toward the negation of that corroboration. "Failure to give such an instruction is a reversible error" (United States v. Polizzi, 801 F.2d 1543, 1549; United States v. Cain, 753 F.2d 1510, 1511). Further, Texas PC § 15.04 statutorily spells out a renunciation defense.

> When legislature has created legally recognizable defense, fundamental Constitutional right of a defendant includes proper jury instructions on the elements of defense so the jury may ascertain whether state has met its burden of **disproving defense beyond a reasonable doubt** [emphasis mine] *(State v. Fuller, 506 A.2d 556, 199 Conn. 273).*

The denial is an egregious violation of due process and equal protection of the laws per the Sixth and Fourteenth Amendments to the Constitution. It is an unreasonable and incorrect application of the Supreme Court rulings.

GROUND 9 – Lack of Articulation

References:

Ganesan v. State 45 S.W. 3d 197, 205
Habeas Petition, Additional Memorandum,
Pages 64 - 67
Respondent's Answer, Pages 17 - 18
Petitioner's Rebuttal, Pages 14, 32 - 33
Magistrate's Report, Pages 11

Magistrate's Contention:

82. The trial judge considered the arguments presented by both sides and made a ruling.

Ganesan's Rebuttal:

83. In Sims v. State of Ga., 87 S.Ct. 639, "Conclusion of a trial judge **must** appear from the record with unmistakable clarity" [emphasis mine]. This is widely recognized as a basic Fourteenth Amendment right.

84. The record, which the Magistrate **did not** independently check, is clear:

(1) The trial judge ruled **before** the balance test that probative value of evidence outweighs prejudicial value (this is the default presumption absent proof to the contrary).

(2) Subsequent to the balance test, and after repeated defense requests, the Judge **refused** to make a finding for the record.

(3) The Judge **wrongly** stated it was for the jury to make this decision.

85. Ganesan's right to due process was destroyed. The evidence at issue was the temporally remote, completely renunciated conversation. It distracted the jury (who the Prosecutor stated on the record expected him to dismiss) from the instant case, took considerable time in testimony and pages of record to present, and supported a preposterous

theory of solicitation by Ganesan, who is alleged to have completed the solicitation in one jailhouse conversation, even though there was no hint of renunciation.

86. Lack of articulation of this balance test made it impossible for Ganesan to raise various elements of the balance test on appeal.

87. The 5th Circuit previously recognized the due process problem lack of articulation creates when in U.S. v. Zabaneh, 837 F.2d 1249, 1264, U.S. v. Robinson, 700 F.2d 213 and U.S. v. Beechum, 582 F.2d 911 articulation by trial court was made **mandatory** when so requested by a party. This opinion is anchored by two Supreme Court cases (Huddleston v. U.S., 108 S.Ct. 1496 [no discretion in conducting the test] and Sims v. State of Ga., 87 S.Ct. 639 [no ambiguity in stating the result for the record]).

88. Ganesan notes that Travis County later pressed six Class A misdemeanor charges using the same evidence, and the Judge in that case performed the same balance test, refused to allow the extraneous evidence, and the result of the trial was "not guilty" (Ganesan v. State, County Court III, Travis County, Hon. Judge David Crain, July 5, 2001, Case No. 492428). Had the Magistrate held the evidentiary hearing Ganesan requested (Petitioner's Rebuttal, paragraph 95, page 35), there having been no such hearing in the State Court proceedings, the transcript from Judge Crain's rulings would have been available to Magistrate. Ganesan notes that the result of Judge Crain's ruling differs from trial judge and resulted in a different result.

Clarification

89. In habeas proceedings, harm and the probable outcome absent the harm are often issues of speculation and judgment. This case differs significantly in that it offers determinate proof of a different outcome: the **same** evidence, treated

differently by a different judge in different case, resulted in a resounding verdict of "not guilty" after only 35 minutes of jury deliberation.

90. Vallabhaneni's perjured testimony of being Ganesan's wife while continually representing herself to the contrary to State and Federal agencies and the banking and insurance industries were the subject matter of two cases in this Court (02-CA-00614 and 03-CA-000300, and they are now on appeal before the 5th Circuit as Case Nos. 03-50193 and 03-50519. Under the circumstances, any motivation that stems from her being Ganesan's wife should be appropriately discounted (Magistrate's Report, Page 4).

91. Ganesan contends that Vallabhaneni and her attorney schemed to entrap Ganesan into admitting a common law marriage on tape. When this failed, they tried using the same tapes to launch an attack on Ganesan's character (State Court Jury Trail on Common Law Marriage, Cause No. 96-14089, Travis County, Texas).

92. Ganesan's May 21 call to Hammonds (Magistrate's Report, Page 5) was taped by Texas Rangers, and **nothing** on that tape supports Hammonds's testimony of solicitation. Ganesan requested evidentiary hearing (Petitioner's Rebuttal to Respondent, paragraph 84, page 33) to play this tape. Ganesan and his friend Chip Kid hired another former inmate, Terry Key, to do construction work, for which Ganesan was also contracting Hammonds. Ganesan requested Mr. Kidd's testimony be taken in that same evidentiary hearing.

93. The length of the phone calls with Hammonds, from telephone company records, disputes Hammonds's theory.

94. The record reveals (1) Prier voluntarily burned her statement to the police and said so in court. (2) Contrary to Prosecutors' theory, defense video tape showed no fear in her interactions with Ganesan on the day after she made her

police statement; on the contrary, she and her son were kissing and joking with Ganesan and her son.

95. For thirteen months after her police report, Prier kept up a long distance romance with Ganesan though letters of endearment, stating that she would follow him anywhere in the world and one day hoped to be his wife. She and her son loved Ganesan dearly and wanted to continue a lasting relationship with him, and these letters were presented as evidence.

96. The jury believed Prier made an irresponsible accusation that she regretted and tried to retract, because, after Prier's testimony, the jury laughed at the Prosecutor. The Prosecutor noted this for the record, along with his belief they expected him to dismiss. Absent Prosecutors' outrageous and escalating unlawful conduct at closing which appeared to have a judicial stamp of approval, there would have been no conviction. Prier's testimony did not make sense to the jury, Ganesan, or the State Appellate Court. Her testimony elicited under duress by the Prosecution (she was brought against her will to testify and held in County jail starting a week before the trial) simply didn't correlate with her behavior on video, her retraction with police, and her long distance romance for a year subsequently.

97. Ganesan's bankruptcy attorney testified he took the money from Ganesan's home for his attorney fees and the fees of another attorney.

98. Ganesan notes that the sufficiency of evidence discussion by the Magistrate distorts Prier's testimony heard by the jury, and Ganesan's contention is buttressed by the jury's reaction as noted by the Prosecutor on the record.

99. Magistrate contends that Ganesan's conversations as merely showing exasperation and patience are best left to be assessed by the credibility of the testimony of the witness (Magistrate's Report, page 8). Ganesan contends that the jury initially did that by laughing and expecting the case to

be dismissed, in the Prosecutor's words, after completion of Prier's testimony. But the subsequent prosecutorial misconduct at closing made it impossible for the jury to rationally consider this appropriately.

100. When the trial record has clear uncontested evidence as to harm and its effect on the outcome, as in this case, habeas relief in mandated.

101. Ganesan strongly objects to any reference to Vallabhaneni as his "wife" until all appeals on this matter and related cases are completed.

102. Ganesan requested the Court evaluate the fundamental fairness of this trial given all issues. It is unclear from the Magistrate's response that he evaluated the fairness of this trial under the cumulative error doctrine (see Petitioner's Rebuttal to Respondent, paragraph 93, page 35).

Questions and Issues

103. Ganesan requests the Court clearly articulate its answers to the following questions for purposes of appellate procedures and judicial economy.

(1) Does the partial reversal and the linkage between Instructions VII and VIII of the jury Charge mandate a clear jury instruction to consider each count separately, and if not, why?

(2) Given the facts of this case, why is it wrong to infer that jury had one overall assessment of Ganesan's guilt and simply signed the two sheets of paper provided to them?

(3) Could a reasonable juror, receiving the jury Charge, link the affirmed count to the acquitted count, and if not, why?

(4) What inference can be drawn from the reversal of count one at trial and how does this affect the issues

raised with respect to Prosecutors, Judge, jury, and defense counsel in the habeas petition?

(5) How is this habeas petition affected by another judge, ruling in a subsequent trial based on the same evidence, ruling counter to the trial judge on most of the issues raised in the Petition, and resulting in a jury finding of "not guilty" in under 35 minutes of deliberation?

(6) What more continual damage could the Prosecutors have done, over and above what they did at this trial, for Ganesan to obtain habeas relief?

(7) Defense counsel and appellate counsel were one and the same. Did a conflict of interest prevent the ground of ineffective counsel from being raised on appeal?

(8) Same defense counsel corrected many of his errors in a subsequent trial based on the same evidence, as detailed in the Petition, and Ganesan was found "not guilty." Is this sufficient proof for the habeas test of "harm and resulting prejudice," and if not, why?

(9) Would this Court take Mr. Garcia's testimony in an evidentiary hearing?

(10) Would this Court call an American Express representative to testify regarding when the Traveler' Checks were issued in an evidentiary hearing?

(11) Would this Court call an Interstate Bank representative to testify when the money was withdrawn?

(12) Would the Court hear the Hammonds entrapment tape in an evidentiary hearing?

(13) When the preconceived theories of defense counsel affected their on-the-job performance, is it justified that Petitioner suffer?

(14) What does "strong corroboration" in Texas P.C. § 15.03(b) as compared to "corroboration" in Texas Code of Criminal Procedure § 38.14 mean, and what was the legislative intent behind the differentiation?

(15) Was the evidence in this case sufficient to meet the requirements of (a) Texas P.C. § 15.03(b) and (b) Texas Code of Criminal Procedure § 38.14? If so, for appellate purposes, will this Court clearly articulate how the evidence met the "strong corroboration" requirement?

(16) How does this Court infer from the record that "Ganesan intended to act on it, and without such inference, why is this case not a non-criminal solicitation of a solicitation as per Texas P.C. § 15.05?

(17) What standard does this Court use to distinguish between "hyperbole" and "intent?"

(18) Did the extraneous evidence meet the Federal habeas standards for "allowance?"

(19) Did the Trial Judge abuse her discretion in allowing the extraneous evidence?

(20) Did the extraneous evidence do anything beyond establishing Ganesan's character?

(21) Was the extraneous evidence just propensity evidence?

(22) What authorities, if any, exist that say "the extreme infirmity in the final stages of pregnancy (in this case with twins) does not produce emotional impact on the judgment of a person? Why is this contrary to the average rational person on the street? What, if any, is the Federal standard on this issue?

(23) Did the trial record, viewed as whole, support the hypothesis that the Judge should have disqualified herself?

(24) Why is the issue of pregnancy, in this case, a "woman's rights issue" as the Magistrate alludes to it?
(25) Did the defense have a reasonable defense theory on the renunciation defense?
(26) Was the renunciation defense theory supported by the evidence in this case?
(27) Why is the underlying reasoning in denying this instruction not wrong?
(28) Given a renunciation instruction, would the jury have had any choice but to find Ganesan "not guilty" and if not, why?
(29) Why was the denial of a renunciation instruction not a violation of "equal protection?"
(30) Why did the Magistrate not independently review the record to verify that the findings of the 403 balance test was not articulated and ruled on, rather than rely on the erroneous State Court's finding?
(31) Why wasn't the above error and its impact on the appellate process measured by the Federal standards, set by the 5th Circuit, adequate for issuing a writ?
(32) Should the Magistrate have expanded the record?
(33) Ganesan did not get an evidentiary hearing in the State Court proceedings. Was the Magistrate correct in not ordering one in these proceedings?
(34) Was there no issue of fact to be determined?
(35) Should the District Court's belief in the fairness of the trial court proceedings be tempered by the reversal of count one?
(36) Under this "tempered standard" will this Court issue a writ?
(37) What is the result of applying the "cumulative error doctrine" to the issues raised in this case?

Request for Relief

104. For the reasons detailed in the forgoing, taken piecemeal and as a whole, the Magistrate failed to present a case for denial of Petitioner's Application for Habeas Corpus under 28 U.S.C. § 2254. Magistrate has made crucial mistakes due to the absence of facts obtainable only through an evidentiary hearing, which Ganesan requested (Petitioner's Rebuttal, pages 34-36) but Magistrate failed to call one. Yet Magistrate's report suggests his recommendation might have been different if he had the additional facts and expanded record. Magistrate, clearly, was not impartial. Furthermore, he failed to address some major issues raised by Ganesan.

105. Petitioner requests the Court obtain an expanded record and hold an evidentiary hearing so that the Magistrate's errors are not repeated. In Fullwood v. Lee, 290 F.3d 663, 666, "To receive evidentiary hearing, Federal habeas prisoner must establish one of six factors:

> (1) The merits of the factual dispute were not resolved in state hearing *(Hammonds tape, Vallabhaneni tape, American Express traveler's Checks, bank cash band, Ganesan testimony, Chip Kid testimony)*.
>
> (2) State factual determination is not fairly supported by the record as a whole *(Vallabhaneni tapes, Hammonds testimony)*.
>
> (3) Fact finding procedure employed by state court was not adequate to afford a full and fair hearing *(no state hearing)*.
>
> (4) There is a substantial allegation of newly discovered evidence *(Garcia testimony)*.
>
> (5) Material facts were not adequately developed at state court hearing *(none was held)*.

> (6) For any reason it appears the trier of fact did not afford petitioner full and fair fact hearing *(none was held)*."

Ganesan has easily established **all** six factors.

106. The Magistrate's Report and Recommendation should not be accepted by the Court. The writ should issue.

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Respectfully Submitted,

Signed by: Apparajan Ganesan
Apparajan Ganesan, Pro Se
TDC 904088
Sanders Estes Unit
1100 Hwy 1807
Venus, TX 76084

CERTIFICATE OF SERVICE

I believe under penalty of perjury that the foregoing is true and correct. A copy of the above was placed in the United States Postal system on the 11th day of September, 2003 for the recipients listed below.

Signed by: Apparajan Ganesan
Apparajan Ganesan
TDC 904088
Sanders Estes Unit
1100 Hwy 1807
Venus, TX 76084

Recipients:

Clerk, US District Court
Western District of Texas
200 W. 8th St.
Austin, TX 78701

Mr. James R. Smith
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1. Texas Criminal Code of Rules and Procedures, Article § 38.14
2. Texas Criminal Code of Rules and Procedures, Article § 38.17
3. Texas Penal Code § 2.01
4. Texas Penal Code § 3.02, Kinkeade & McCollough's 2002-2003 Edition, page 23
5. Texas Penal Code § 15.03
6. Texas Penal Code § 15.04
7. Texas Penal Code § 15.05
8. Constitution of the United States, Sixth and Fourteenth Amendments
9. Vernon's Ann. Texas Constitution, Article 1 § 10

Note for Writ of Certiorari: Page numbers are left as in original petition; they have not been changed to agree with the page numbering in this Appendix.

Related Cases

1. Ganesan v. State, County Court III, Travis County, Hon. Judge David Crain, July 5, 2001, Case No. 492428
2. Ganesan v. U.S. Attorney, et al, 03-CA-00030, now in 5th Circuit as Case No. 03-50519
3. Ganesan v. Vallabhaneni, et al, 02-CA-00614, now in 5th Circuit as Case No. 03-50193
4. State Court Jury Trail on Common Law Marriage, Cause No. 96-14089, Travis County, Texas

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-00-00125-CR

Apparajan Ganesan, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 390TH JUDICIAL DISTRICT NO. 0995324, HONORABLE JULIE H. KOCUREK, JUDGE PRESIDING

A jury convicted appellant Apparajan Ganesan on two counts of solicitation to commit murder. *See* Tex. Penal Code Ann. §§ 15.03, 19.02 (West 1994). The jury found that appellant solicited Reda Sue Prier to kill Sudha Vallabhaneni, appellant's wife, and Amy Wright, the lawyer representing Vallabhaneni in her divorce action. The jury assessed punishment for each count at imprisonment for ten years, to be served concurrently. We will affirm the conviction on one count, but reverse and render an acquittal on the other.

SUFFICIENCY OF EVIDENCE

Proof of Solicitation

In his first issue, appellant contends the State did not prove that he engaged in criminal solicitation as defined in the penal code and alleged in the indictment. The penal code provides that a person commits an offense if, with intent that a capital or first degree felony be committed, he "requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission." *Id.* § 15.03(a). The two counts of the indictment alleged that appellant, with the requisite intent, requested Prier "to engage in specific conduct, to wit: to kill [the complainant]" under circumstances that "would have made Reda Sue Prier a party to the commission of murder." It is undisputed that appellant did not ask Prier to kill either Vallabhaneni or Wright. Instead, Prier testified that appellant repeatedly asked her to find someone to kill them. Appellant contends that Prier's testimony does not reflect a criminal solicitation, but merely a noncriminal "solicitation of solicitation.

In *Johnson v. State*, 650 S.W.2d 784, 787 (Tex. Crim. App. 1983), the indictment alleged that the defendant "attempted to induce Roger Bryant to employ another" to commit a murder. The defendant argued that asking Bryant to employ another to commit murder was a solicitation of a solicitation, and therefore not an offense under the terms of penal code section 15.05. *See* Tex. Penal Code Ann. § 15.05 (West 1994) (solicitation of a chapter 15 preparatory offense is not an offense). The court rejected this argument. Citing the last phrase in section 15.03(a), the court noted that the act solicited must either constitute the intended felony or make the person solicited a party to its commission. *Johnson*, 650 S.W.2d at 787. The act solicited by the defendant, Bryant's employment of another to commit murder, would make Bryant a party to the murder. Thus, the defendant's solicitation of Bryant constituted an offense under section 15.03. *Id.*

If, in the cause before us, Prier had arranged for someone else to kill appellant's wife and her attorney as she testified that appellant requested and attempted to induce her to do, Prier would have been a party to the murders. *See* Tex. Penal Code Ann. § 7.02(a)(2) (West 1994). Appellant's contention that Prier's testimony does not show that he committed a criminal solicitation under section 15.03 is without merit. Issue one is overruled.[1]

Corroboration of Solicitee

Appellant's further contends that Prier's testimony was not adequately corroborated. A person may not be convicted of criminal solicitation on the uncorroborated testimony of the person allegedly solicited and "unless the solicitation is made under circumstances strongly corroborative of both the solicitation itself and the actor's intent that the other person act on the solicitation." Tex. Penal Code Ann. § 15.03(b) (West 1994). Section 15.03(b) is analogous to the accomplice witness statute, and the same test for evaluating the sufficiency of the corroboration is used. *Richardson v. State*, 700 S.W.2d 591, 594 (Tex. Crim. App. 1985); *see also* Tex. Code Crim. Proc. Ann. art. 38.14 (West 1979). Therefore, we must eliminate Prier's testimony from consideration and determine whether there is other evidence tending to connect appellant to the crime. *Richardson*, 700 S.W.2d at 594. The corroboration must go to both the solicitation and the alleged intent, but need not be sufficient in itself to establish guilt. *Id.* We view the corroborating evidence in the light most favorable to the verdict. *Gill v. State*, 873 S.W.2d 45, 48 (Tex. Crim. App. 1994); *Utsey v. State*, 921 S.W.2d 451, 453 (Tex. App.--Texarkana 1996, pet. ref'd).

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[1] Although appellant does not brief this issue, we also conclude that there is no fatal variance between the indictment and the evidence. The indictment alleged that appellant asked Prier "to engage in specific conduct, to wit: to kill" Vallabhaneni and Wright, under circumstances that "would have made Reda Sue Prier a party to the commission of murder." Appellant did not object to the form or substance of the indictment. See Tex. Code Crim. Proc. Ann. art. 1.14(b) (West Supp. 2001). An indictment need not allege the facts which make a party criminally responsible for the conduct of another. Pitts v. State, 569 S.W.2d 898, 900 (Tex. Crim. App. 1978). Although there is no evidence that appellant solicited Prier to kill Vallabhaneni and Wright, there is evidence that he solicited Prier to arrange for the murders, which would have made Prier a party as alleged.

Appellant is an engineer who had designed a computer chip that he hoped to market in partnership with a Swiss corporation. In November 1996, one month after Vallabhaneni filed for divorce, appellant liquidated his brokerage account and ordered that the proceeds, over one million dollars, be wired to a Swiss bank account. Before the money could be moved, however, his wife obtained a restraining order and the money was deposited in the registry of the court. In late 1997 or early 1998, appellant filed for bankruptcy. Vallabhaneni, as a claimant to the funds, was scheduled to be deposed in the bankruptcy proceeding in November 1998. The alleged solicitations for the murders of Vallabhaneni and Wright took place in September and October 1998.

The record reflects that appellant believed that his wife's actions were damaging his ability to market the computer chip. During a telephone conversation with Vallabhaneni in January 1997, which she tape recorded on Wright's advice, appellant said that her divorce action was "making sure that this product will die." Appellant went on, "Let me tell you this. I don't care what you do. If this product dies, one of us will be dead, yeah, I promise you that." Vallabhaneni replied, "What do you mean, you'll kill me?" Appellant answered, "I will kill myself or I'll kill you or I'll kill both of us or you will kill yourself. That much I can tell you. If . . . this product dies, one of us will die. I know that. Because I won't be able to live with the shame. Maybe you will be able to live with it."

In *Richardson*, the defendant was convicted of soliciting the murder of a man who was scheduled to testify against him in a prosecution for theft. The court of criminal appeals stated that the "theft charge and [the victim's] actions with respect to it suggest[] the existence of an agreement [between the defendant and the alleged solicitee]." *Id.* at 595. Applying the reasoning of *Richardson*, appellant's belief that his wife's litigation threatened to derail a potentially lucrative business opportunity was evidence of motive that tends to support Prier's testimony that appellant solicited the murders of his wife and her attorney. While evidence of motive is insufficient in itself to corroborate an accomplice, it may be considered with other evidence to connect the accused with the crime. *Leal v. State*, 744 S.W.2d 112, 127 (Tex. Crim. App. 1988).

Appellant's statement that "one of us will be dead" if the chip design did not succeed adds some additional support to the existence of the solicitation of Vallabhaneni's murder. In his brief, appellant dismisses his remarks during the telephone conversation as nothing more than hyperbole, and notes that the conversation took place twenty months before the alleged solicitation. But viewing the evidence in the light most favorable to the jury's verdict, as we must, we cannot disregard the threat implicit in appellant's statement.

Appellant was arrested in May 1997 for violating a protective order obtained by Vallabhaneni. While in the Travis County Jail, he met James Hammonds, who was awaiting his release on bail following an arrest for theft.

Hammonds testified that appellant told him "about how his wife and the system and the judge had destroyed his life and his business and how he was losing everything." According to Hammonds, appellant asked, "Do you know of anyone, or can you take care of my wife for me?" When Hammonds replied, "Excuse me?" appellant said, "You know what I mean." Hammonds said that this "really scared me" and that he thought he was "being set up by the cops." Hammonds refused to give appellant his address but gave appellant a telephone number where he could be reached, not expecting appellant to call.

A few weeks later, however, appellant called Hammonds and asked if he "remember[ed] the conversation in the cell that we had." Appellant added, "I need to talk to you about this again. We need to talk about this." Still fearing that he was being tricked, Hammonds told appellant his upcoming trial date and suggested that they meet at the courthouse. After giving the matter further consideration, Hammonds contacted the police and reported what appellant had said. Subsequently, under the supervision of a Texas Ranger, Hammonds (who had obtained appellant's telephone number by means of caller ID) called appellant while being recorded. When Hammonds attempted to talk about their previous conversations, appellant "started back-peddling. He started trying to get out of the conversation. He didn't want to talk about that." The call ended and the police did not pursue the matter to Hammonds's knowledge.

That appellant solicited Hammonds to kill his wife, albeit sixteen months before the alleged solicitation of Prier, tends to corroborate Prier's testimony both as to the solicitation itself and appellant's intent that Prier act on the solicitation. *See Varvaro v. State*, 772 S.W.2d 140, 143-44 (Tex. App.--Tyler 1988, pet. ref'd). But Hammonds's testimony corroborates Prier only with respect to the solicitation of Vallabhaneni's murder. It does not tend to connect appellant to the alleged solicitation of Wright's murder.

Prier testified that during the months appellant was asking her to arrange the murders, he instructed her to go to a post office near the Arboretum shopping center and watch who came and went. She also testified that appellant told her to watch an office on Lake Austin Boulevard, which he identified as Wright's husband's law office. The State contends this testimony was corroborated by Vallabhaneni's testimony that she received her mail at the Arboretum post office and by Wright's testimony that her husband's law office was in a building on Lake Austin Boulevard. Standing alone, however, this alleged corroborative evidence does not connect appellant to the criminal solicitations. Vallabhaneni's and Wright's testimony is meaningless except by reference to Prier's testimony. Such "bootstrapping" cannot be used to corroborate an accomplice, and by extension cannot be used to corroborate a solicitee. *See Sonenschein v. State*, 722 S.W.2d 450, 452 (Tex. App.--Austin 1987, pet. ref'd).

The State also contends that Prier's testimony was corroborated by appellant's bankruptcy attorney. This witness testified that in November 1998, following appellant's arrest for the instant offense and at appellant's direction, he retrieved over $100,000 in cash from appellant's house. The State argues that this shows appellant had the financial means to pay for the solicited murders and to flee if necessary. But once again, this evidence has little significance standing alone. Appellant's possession of a large sum of cash is inculpatory, if at all, only when it is considered in light of Prier's testimony regarding the alleged solicitations. We must disregard Prier's testimony in our search for corroborating evidence. *Richardson*, 700 S.W.2d at 594; *Sonenschein*, 722 S.W.2d at 452.

Finally, the State asks this Court to consider evidence tendered by the State but excluded by the district court. The State cites no pertinent authority that would permit this Court to consider excluded testimony in determining the sufficiency of the evidence to sustain a criminal conviction, and we decline to do so. The State did not file a cross-appeal and the propriety of the district court's ruling is not before us. *See* Tex. Code Crim. Proc. Ann. art. 44.01(c) (West Supp. 2001).

We conclude that the evidence of motive, the veiled threat during the telephone conversation, and the earlier solicitation of Hammonds adequately corroborates Prier's testimony both as to appellant's solicitation of Vallabhaneni's murder and appellant's intent that Prier act on the solicitation. We find, however, insufficient corroboration for Prier's testimony regarding appellant's solicitation of Wright's murder. Therefore, we will overrule issue two in part and sustain it in part, reverse appellant's conviction on count one of the indictment, and render a judgment of acquittal on that count.

OTHER ISSUES

Extraneous Offense

Appellant contends Hammonds's testimony was erroneously admitted over his rule 403 objection because the court failed to perform the necessary balancing test to determine whether the probative value of the testimony was outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence. *See* Tex. R. Evid. 403.

Appellant does not argue that the court reached the wrong conclusion after applying the test. Instead, appellant argues that the court failed to apply the proper balancing test at all.

The State first tendered Hammonds's testimony outside the jury's presence. As part of its presentation, the State submitted a memorandum, in the record as court's exhibit one, summarizing the holdings of several opinions, including the leading case on the subject of extraneous misconduct evidence, *Montgomery v. State*, 810 S.W.2d 372, 386 (Tex. Crim. App. 1991) (op. on reh'g). In its discussion of *Montgomery*, this memorandum set out the factors the trial court is to consider when balancing probative value against the danger of unfair prejudice pursuant to rule 403: (1) the probative value of the extraneous misconduct evidence with regard to a fact of consequence in the case; (2) the potential for the challenged evidence to impress the jury in some irrational but indelible way; (3) the time needed to develop the extraneous misconduct evidence; and (4) the proponent's need for the evidence. *See id.* at 389-90. The prosecutor discussed each of these factors with the court and counsel for appellant responded. The court then heard Hammonds's testimony without the jury. Then, after further argument by the parties, the court overruled appellant's rule 404(b) and 403 objections. *See* Tex. R. Evid. 404(b).

At this point, defense counsel asked the court to "perform a [rule 403] balancing test." The court replied, "I did, but I'll go ahead and do it again for you. The Court does find that the probative value outweighs the prejudicial effect in view of all the factors that are -- have been presented in this case." Counsel pursued the matter, asking the court to expressly address the four factors discussed in *Montgomery*. When asked by counsel to make a finding "with regard to impressing the jury in a potentially irrational manner," the court responded, "Okay. As far as the potential of this evidence to impress the jury in an irrational manner, the Court is not going to make a finding in that regard because I think it's presumptuous to assess -- my job is not to be the fact finder in this case. That's the jury's job. So I'll not make that finding."

Appellant's contention is that the court failed to consider the potential for Hammonds's testimony to impress the jury in some irrational but indelible way. The record is to the contrary. This issue was expressly addressed in the State's trial memorandum and discussed by the prosecutor during his argument in favor of admission. The court expressly stated that it had performed the rule 403 balancing test and found that "the probative value outweighs the prejudicial effect in view of all the factors that . . . have been presented." Although the court refused to make an express finding on the issue, *Montgomery* does not require a trial court to conduct the rule 403 balancing test on the record or to expressly articulate the reasons for its ruling.[2] *Caballero v. State*, 919 S.W.2d 919, 922 (Tex. App.--Houston [14th Dist.] 1996, pet. ref'd); *Houston v. State*, 832 S.W.2d 180, 184 (Tex. App.--Waco 1992), *pet. dism'd, improvidently granted*, 846 S.W.2d 848 (Tex. Crim. App. 1993). Issue three is overruled.[3]

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[2] It appears that appellant's request for an express finding was misunderstood by the court to be a request for the court to determine the probative value of the proffered evidence.

[3] Were the issue raised, we would rule that the district court did not abuse its discretion by overruling appellant's objection to Hammonds's testimony. Prier's credibility was the principal issue at trial, both factually and legally. Hammonds's testimony was crucial to the State; without it, it is unlikely that Prier's testimony regarding the solicitation of Vallabhaneni's murder would have been adequately corroborated. Hammonds's testimony did not have the potential for influencing the jury in some irrational way, since it was directly related to the statutory corroboration issue.

Jury Instruction

Appellant contends the court erred by refusing to instruct the jury on the renunciation defense. It is an affirmative defense to prosecution for criminal solicitation that the defendant countermanded his solicitation under circumstances manifesting a voluntary and complete renunciation of his criminal objective. Tex. Penal Code Ann. § 15.04(b) (West 1994). Appellant urges that Hammonds's testimony that appellant "started back-peddling" during their last telephone conversation raised the renunciation defense.

Appellant's trial request was that the court give the renunciation instruction "with regard to the extraneous offense," that is, with regard to the solicitation of Hammonds. But appellant was on trial for soliciting Prier. Hammonds's testimony did not raise an issue as to whether appellant countermanded his solicitation of Prier. Issue five is overruled.

Jury Argument

Prosecutor Amy Casner concluded her opening argument at the guilt stage by saying that the police and prosecutors had done all they could, that the jury was the "last link in the chain," and that "the evidence tells you he's guilty." She then added, "And if you acquit that man, you are signing those two women's death warrants." Appellant objected that this was an "improper and inflammatory argument that has nothing to do with the rendition of the evidence." The objection was overruled and the prosecutor repeated, "Ladies and gentlemen, you will be signing the death warrants of those two young women if you acquit this man because the evidence tells you he's guilty." Appellant requested a "running objection," which was granted, and Casner's argument ended.

Prosecutor Bill Mange returned to this theme is his closing argument at the guilt stage: "Well, in this case they have tried to put Amy Wright on trial. They have tried to put Reda Sue Prier on trial. . . . This trial is about . . . Apparajan Ganesan, who is trying to kill these two women, and if he walks away with a not guilty, they are dead. Count on it." Appellant objected that this was an "inflammatory statement . . . that's meant entirely to inflame the jury . . . ." The court did not rule on the objection, but admonished the prosecutor to "refrain from -- you've already have that said once -- from the inflammatory statements." After further argument, however, Mange concluded by saying, "I have said all I have to say. Lives are depending on you. All I ask is that you look at the evidence and do the right thing. The evidence is all there is." Appellant objected, "That is totally improper argument. Lives are depending on this, there's no evidence that that's the truth." This objection was sustained and the jury was instructed to disregard. Appellant's motion for mistrial was overruled.

In order to preserve error regarding the State's jury argument, a defendant must object to the argument and pursue the objection to an adverse ruling. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996). Under *Cockrell*, appellant failed to preserve any error with regard to Mange's "they are dead" argument.

As has often been said, proper jury argument is limited to: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) an answer to the argument of opposing counsel; and (4) a plea for law enforcement. *Wilson v. State*, 938 S.W.2d 57, 59 (Tex. Crim. App. 1996); *Alejandro v.*

State, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973). Appellant argues that the complained-of arguments "invited the jury to speculate on matters outside the record" and were "calculated to have a prejudicial effect" on him. The State responds that the challenged arguments were reasonable deductions from the evidence and legitimate pleas for law enforcement. The State reminds us that "a prosecutor may strike hard blows but not foul ones." *Harris v. State*, 996 S.W.2d 232, 237 (Tex. App.--Houston [14th Dist.] 1999, no pet.).

Evidence that appellant had twice solicited his wife's murder, and had on the second occasion also solicited the murder of her attorney, reasonably supports an argument that appellant would again solicit the murders if given the chance. The prosecutors could legitimately urge the jury to convict appellant both to punish his past criminal conduct and to prevent such misconduct in the future. The prosecutors exceeded the scope of proper jury argument, however, by telling the jurors that they would be condemning two women to death if they were to find appellant not guilty. Such an inflammatory assertion cannot be characterized as a mere deduction from the evidence or plea for law enforcement.

The court sustained appellant's objection to Mange's statement that lives depended on the jury returning a guilty verdict and instructed the jury to disregard it. In most cases, such an instruction will cure jury argument error. *Shannon v. State*, 942 S.W.2d 591, 597 (Tex. Crim. App. 1996). While the efficacy of the court's instruction may have been reduced by the court having permitted Casner's earlier, more inflammatory remarks to go uncorrected, we conclude that the court's instruction was sufficient to cure the error in Mange's argument.

Casner's argument presents a more difficult question. Not only was her "death warrant" remark more extreme than Mange's, the court erroneously overruled appellant's objection and permitted the remark to be repeated. Not every improper jury argument requires reversal, however. *McKay v. State*, 707 S.W.2d 23, 38 (Tex. Crim. App. 1985). Reversible error is presented when jury argument: (1) violates a mandatory statute; (2) injects new and harmful facts into the case; or (3) is manifestly improper, harmful, and prejudicial to the rights of the accused. *Wilson*, 938 S.W.2d at 59; *McKay*, 707 S.W.2d at 38. Casner's remark did not violate a mandatory statute or inject new facts into the case. While the question is a close one, we conclude that Casner's argument was not so manifestly improper or prejudicial under the circumstances as to warrant reversal. Issue four is overruled.

The district court prepared separate judgments on each count of the indictment. We reverse the judgment of conviction on count one and render a judgment of acquittal. The judgment of conviction on count two is affirmed.

Mack Kidd, Justice

Before Justices Kidd, Yeakel and Powers*

Affirmed in Part; Reversed and Rendered in Part

Filed: February 28, 2001

Publish

* Before John E. Powers, Senior Justice (retired), Third Court of Appeals, sitting by assignmenty. *See* Tex. Gov't Code Ann. § 74.003(b) (West 1998).

1E

CAUSE NO. 99-5324

THE STATE OF TEXAS § IN THE 390TH
§
V. § DISTRICT COURT OF
§
APPARAJAN GANESAN § TRAVIS COUNTY, TEXAS

Files in the District
Court of Travis
County, Texas
on December 16, 1999
at 3:30 PM
Amalla Rodriquez-
Mendoza, Clerk

CHARGE OF THE COURT

Ladies and Gentlemen of the Jury:

The defendant, Apparajan Ganesan, stands charged by indictment with the offense of criminal solicitation[1], alleged in the first paragraph of the indictment to have been committed in Travis County, Texas, on or about the 2nd day of November, 1998, and alleged in the second paragraph of the indictment to have been committed on or about the 7th day of September, 1998. To this charge and each paragraph thereof the defendant has entered a plea of not guilty. You are instructed that the law applicable to this case is as follows:

I.

A person commits the offense of criminal solicitation if, with intent that a felony of the first degree be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the defendant believes them to be, would constitute the felony or make the other a party to its commission.

It is no defense to prosecution under this section that:

(1) the person solicited is not criminally responsible for the felony solicited;

(2) the person solicited has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a . different type or class of offense, or is immune from prosecution;

(3) the defendant belongs to a class of persons that by definition of the felony solicited is legally incapable of committing the. offense in an individual capacity; or

(4) the felony solicited was actually committed.

II.

A person acts intentionally, or with intent, with respect to the nature of his conduct when it is his conscious objective or desire to engage in the conduct.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist.

III.

You are instructed that murder is a felony of the first degree. A person commits the offense of murder if he intentionally or knowingly causes the death of an individual.

IV.

"Individual" means a human being who has been born and is alive.

V.

A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

A person is criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.

VI.

You are further charged as a part of the law in this case that the state is not required to prove the exact date alleged in the indictment but may . prove the offense, if any, to have been committed at any time prior to the presentment of the indictment so long as said offense, if any, occurred within 3 years of the date of the presentment of the indictment; you are further instructed that the day the indictment was presented and the day of the offense, if any, occurred, shall not be computed within the 3 year limitation period.

The jury is instructed that the Court has taken judicial notice that the indictment in this cause was presented to the grand jury and filed on November 5th, 1999.

The jury is further instructed that it may, but is not required to, accept as conclusive the fact judicially noticed.

VII.

Now bearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt, that the Defendant, Apparajan Ganesan, on or about the 2nd day of November, 1998, in the County of Travis, and State of Texas, did then and there, with intent that murder, a first degree felony be committed, request, command, or attempt to induce Reda Sue Prier to engage in specific conduct, to wit: to kill Amy Wright, that under the circumstances surrounding the conduct of Reda Sue Prier, as Apparajan Ganesan believed them to be, would have made Reda Sue Prier a party to the commission of murder, you will find the defendant guilty of the offense of criminal solicitation and so say by your verdict, but if you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "Not Guilty." In either case, proceed to consider whether the defendant is guilty or not guilty of the charges alleged in the second paragraph of the indictment as set out in the following paragraph.

VIII.

Now bearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt, that the Defendant, Apparajan Ganesan, on or about the 7th day of September, 1998, in the County of Travis, and State of Texas, did then and there, with intent that murder, a first degree felony be committed, request, command, or attempt to induce Reda Sue Prier to engage in specific conduct, to wit: to kill Sudha Vallabhaneni, that under the circumstances surrounding the conduct of Reda Sue Prier, as Apparajan Ganesan believed them to be, would have made Reda Sue Prier a party to the commission of murder, you will find the defendant guilty of the offense of criminal solicitation and so say by your verdict, but if you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "Not Guilty." IX.

A person may not be convicted of criminal solicitation on the uncorroborated testimony of the person allegedly solicited and unless the solicitation is made under circumstances strongly corroborative of both the solicitation itself and the defendant's intent that the other person act on the solicitation.

Now, therefore, even if you believe from the evidence beyond a reasonable doubt that the defendant did commit the offense of criminal solicitation as alleged in the indictment, in order to find the defendant guilty you must further believe beyond a reasonable doubt that the testimony of Reda Sue Prier is corroborated by other evidence and that the solicitation was made under circumstances strongly corroborative of both the solicitation itself and the defendant's intent that the other person act on the solicitation, but if you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "Not Guilty."

X.

The defendant is on trial solely on the charge contained in the indictment. In reference to evidence, if any, that the defendant has previously participated in recent transactions or acts, other than but similar to that which is charged in the indictment in this case, you are instructed that you can not consider such other transactions or acts, if any, for any purpose unless you find and believe beyond a reasonable doubt that the defendant participated in such transactions or committed such acts, if any; and even then you may only consider the same for the purpose of determining intent or knowledge or motive or common plan or scheme, if it does, and for no other purpose.

XI.

In a criminal case the law permits a defendant to testify in his own behalf, but he is not compelled to do so, and the same law provides that the fact that a defendant does not testify shall not be considered as a circumstance against him. You will, therefore, not consider the fact that the defendant did not testify as a circumstance against him; and you will not in . considering your verdict allude to, comment on, or in any manner refer to the fact that the defendant has not testified.

XII.

You are further instructed as a part of the law in this case that the indictment against the defendant is not evidence in the case, and that the true and sole use of the indictment is to charge the offense, and to inform defendant.

It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his or her affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you and these instructions, you will acquit the defendant and say by your verdict "not guilty."

You are charged that it is only from the witness stand that the jury is permitted to receive evidence regarding the case, or any witness therein, and no juror is permitted to communicate to any other juror anything he or . she may have heard regarding the case or any witness therein, from any source other than the witness stand.

In deliberating on this cause you are not to refer to or discuss any matter or issue not in evidence before you; nor talk about this case to anyone not of your jury; and after the reading of this charge, you shall not separate from each other until you have reached a verdict. Further, you shall not discuss or consider the punishment, if any, which may be assessed against the defendant in the event he is found guilty beyond a reasonable doubt.

You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to the testimony, but you are bound to receive the law from the Court, which is herein given you, and be governed thereby.

8E

After argument of counsel, you will retire and select one of your members as your foreperson. It is his or her duty to preside at your deliberations and to vote with you in arriving at your verdicts. Your verdicts must be unanimous, and after you have arrived at your verdicts, you may use the forms attached hereto by having your foreperson complete and sign his or her name to the forms in conformance with your verdicts.

Respectfully submitted,

signed:\\ Julie Kocurek
JULIE KOCUREK
Presiding Judge

9E

CAUSE NO. 99-5324

THE STATE OF TEXAS	§	IN THE 390TH
	§	
VS.	§	DISTRICT COURT OF
	§	
APPARAJAN GANESAN	§	TRAVIS COUNTY, TEXAS

VERDICT OF THE JURY

Verdict Form 1

We, the Jury, find the defendant, Apparajan Ganesan, guilty of the offense o Criminal Solicitation of the murder of Amy Wright as alleged in the first paragraph of the indictment.

Files in the District
Court of Travis
County, Texas
on December 17, 1999
at 11:00 AM
Amalla Rodriquez-
Mendoza, Clerk

signed:\\ Bill Morris, Jr.
Foreperson

10E

CAUSE NO. 99-5324

THE STATE OF TEXAS	§	IN THE 390TH
	§	
VS.	§	DISTRICT COURT OF
	§	
APPARAJAN GANESAN	§	TRAVIS COUNTY, TEXAS

VERDICT OF THE JURY

Verdict Form 2

We, the Jury, find the defendant, Apparajan Ganesan, guilty of the offense o Criminal Solicitation of the murder of Sudha Vallabhaneni as alleged in the second paragraph of the indictment.

Files in the District
Court of Travis
County, Texas
on December 17, 1999
at 11:00 AM
Amalla Rodriquez-
Mendoza, Clerk

signed:\\ Bill Morris, Jr.
Foreperson

D.A.#99-8302/PID#0246412/Pending Case/No Complaint
No. 995324 The State of Texas v. Apparajan Ganesan
Indictment Murder/Solicitation
Bond $ same
In The 331st Judicial District Court of Travis County, Texas

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY, for the County of Travis, State of Texas, duly selected, empaneled, sworn, charged, and organized as such at the JULY Term, A.D. 1999, of the 331 st Judicial District Court for said County, upon its oath presents in and to said Court at said term, that Apparajan Ganesan, on or about the 2nd day of November A.D. 1998, and before the presentment of this indictment, in the County of Travis, and State of Texas, did then and there, with **intent** [emphasis added by Ganesan] that murder, a first degree felony be committed, request, command, and attempt to induce Reda Sue Prier to engage in specific conduct, to wit: to kill Amy Wright, that under the circumstances surrounding the conduct of Reda Sue Prier, as Apparajan Ganesan believed them to be, would have made Reda Sue Prier a party to the commission of murder,

Paragraph II

And the Grand Jury further presents that on or about the 7th day of September A.D. 1998, and before the presentment of this indictment in the County of Travis and State of Texas Apparajan Ganesan did then and there, with **intent** [emphasis added by Ganesan] that murder, a first degree felony be committed, request, command, and attempt to induce Reda Sue Prier to engage in specific conduct, to wit: to kill Sudha

Vallabhaneni, that under the circumstances surrounding the conduct of Reda Sue Prier, as Apparajan Ganesan believed them to be, would have made Reda Sue Prier a party to the commission of murder,

Against the peace and dignity of the State.

Signed by: Nat Lede [?]
Foreperson of the Grand Jury

1F

TEXAS PENAL CODE

TITLE 4. INCHOATE OFFENSES

CHAPTER 15. PREPARATORY OFFENSES

§ 15.03. Criminal Solicitation

(a) A person commits an offense if, with intent that a capital felony or felony of the first degree be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission.

(b) A person may not be convicted under this section on the uncorroborated testimony of the person allegedly solicited and unless the solicitation is made under circumstances strongly corroborative of both the solicitation itself and the actor's intent that the other person act on the solicitation.

(c) It is no defense to prosecution under this section that:

(1) the person solicited is not criminally responsible for the felony solicited;

(2) the person solicited has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution;

(3) the actor belongs to a class of persons that by definition of the felony solicited is legally incapable of committing the offense in an individual capacity; or

(4) the felony solicited was actually committed.

(d) An offense under this section is:

(1) a felony of the first degree if the offense solicited is a capital offense; or

(2) a felony of the second degree if the offense solicited is a felony of the first degree.

Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 462, § 1, eff. Sept. 1, 1993; Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994.

§ 15.04. Renunciation Defense

(a) It is an affirmative defense to prosecution under Section 15.01 that under circumstances manifesting a voluntary and complete renunciation of his criminal objective the actor avoided commission of the offense attempted by abandoning his criminal conduct or, if abandonment was insufficient to avoid commission of the offense, by taking further affirmative action that prevented the commission.

(b) It is an affirmative defense to prosecution under Section 15.02 or 15.03 that under circumstances manifesting a voluntary and complete renunciation of his criminal objective the actor countermanded his solicitation or withdrew from the conspiracy before commission of the object offense and took further affirmative action that prevented the commission of the object offense.

(c) Renunciation is not voluntary if it is motivated in whole or in part:

(1) by circumstances not present or apparent at the inception of the actor's course of conduct that increase the probability of detection or apprehension or that make more difficult the accomplishment of the objective; or

(2) by a decision to postpone the criminal conduct until another time or to transfer the criminal act to another but similar objective or victim.

(d) Evidence that the defendant renounced his criminal objective by abandoning his criminal conduct, countermanding his solicitation, or withdrawing from the conspiracy before the criminal offense was committed and made substantial effort to prevent the commission of the object offense shall be admissible as mitigation at the hearing on punishment if he has been found guilty of criminal attempt, criminal solicitation, or criminal conspiracy; and in the event of a finding of renunciation under this subsection, the punishment shall be one grade lower than that provided for the offense committed.

Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994.

§ 15.05. No Offense

Attempt or conspiracy to commit, or solicitation of, a preparatory offense defined in this chapter is not an offense.

Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994.

Appendix G

1997 International Solid State Circuits Conference

February 1997

SA 21.3: A High-Performance Autozeroed CMOS Opamp with 50μV Offset

FrancoisKrummenacher[2]-[1], RezaVafadar[1],
Apparajan Ganesan[3], VladoValence[1]

[1]MEAD Microelectronics S.A., St-Sulpice, Switzerland
[2]Smart Silicon Systems S.A., Lausanne, Switzerland
[3]Ganesan Consulting, Austin, TX

Bandwidth, dc gain, offset and noise are the major performance parameters that limit the applicability of operational amplifiers (opamps). The design of a general-purpose opamp in a digital CMOS process that offers excellent performance in all these categories is a long-standing challenge for the analog designer. While MOSFET amplifiers have extremely small bias currents, they exhibit much larger offset voltages and low-frequency noise than their BJT counterparts.

A high-performance opamp in a 1 μm 5V digital CMOS technology achieves high dc gain, as well as excellent PSRR and CMRR and is capable of driving a 10052, 1nF load. It uses a mixed-mode (analog/digital) compensation loop to reduce input offset to <50μV. The loop uses digital offset extraction and storage circuitry, and has an analog current-mode output. Offset cancellation can be performed at power-up or upon request.

Unlike existing commercially available low-offset high-precision amplifiers, the opamp needs only a single 5V low-voltage supply, requires no trimming, and uses no BJTs or JFETs. Thus, although developed as a stand-alone product, it can potentially be used as an on-chip component of larger mixed-mode ICs.

A schematic of the autocalibrated offset opamp is shown in Figure 1. For high dc gain, large bandwidth, high CMRR and PSRR, and drive capability, the opamp is built around a 3-stage topology: two gain stages and one rail-to-rail, class AB output stage. The input pair MI and M2 is cascoded by transistors M5 and M6 to maximize CMRR performance. A multipath nested Miller topology is used for frequency compensation [1]. The additional input pair M3 and M4 bypasses the intermediate stage M7 and M8 at high frequencies to improve stability.

A smooth transition from the high-gain, low-frequency path to the low-gain, high-frequency path requires matching transconductances of M1 and M2 to those of M3 and M4. The class-AB output stage features rail-to-rail voltage swing and incorporates additional switches (M 12 and M13) to put the output node into high-impedance mode during auto-calibration [2]. The offset cancellation uses a current-mode DAC (CALDAC), the fullscale current of which is approximately 1096 of the input pair tail current. This allows the cancellation of up to ±5 mV input offset. The digital code producing the cancellation current is stored in the successive approximation register (SAR).

During autocalibration, when CAL= 1, the opamp is removed from the signal path. Both inputs are tied to GND and the output transistors M10 and M11 are disconnected from their respective supplies. The output is thus floating, while the small replica transistors M20 & M21 (scaled to M 10 & M 11) are used to provide the amplifier output signal for the calibration circuit. The compensation capacitors Ccl, Cc2 and Cc3 are no longer necessary since the opamp is now used in open-loop configuration as a comparator, and are also disconnected from the output terminal. When offset cancellation is initiated after power-up or user request, an on-chip RC oscillator is activated to provide timing of the successive approximation algorithm, which is completed after N clock cycles, where N is the number of bits required by the DAC.

During calibration, the output offset voltage approaches zero, and the amplifier enters its linear operating range. However, due to high-frequency noise, the output voltage may swing rapidly up and down, since the opamp is no longer band-limited by the compensation capacitors. This could severely limit the accuracy of an offset cancellation procedure (such as the successive approximation algorithm) that does not involve some kind of averaging. This is the reason why a simple low-pass filter (LPF) is introduced in the decision chain. The LPF is implemented here in an analog manner and is followed by a Schmitt trigger to interface with the SAR logic. Note that filtering could be implemented digitally as well, but this was found to require more chip area.

The key opamp parameters CMRR, PSRR and offset drift are optimized for offset performance. The linearity of the CALDAC, however, is not important as long as its monotonicity is guaranteed. The DAC is implemented as a binary-weighted current array using a pseudo R-2R MOSFET ladder architecture that requires only 3N identical MOSFETS for N- bit resolution [3]. The DAC area is only $0.04mm^2$ for N=12, including the control switches.

The ability to read from or to write into the SAR register directly is a feature of this architecture that allows easy monitoring of the offset performance by retrieving the digital code stored in the SAR after calibration. For example, during wafer test it is easy to check whether the offset stays within presribed limits by making sure that the opamp output changes from zero to VDD when lower and upper full-scale codes are entered successively into the SAR.

A die micrograph of the 2.Zx1.9mmz chip containing two opamps is shown in Figure 2. It is in a 5V single-poly, double-metal, 1 Nm digital CMOS process. To fit into an 8-pin package while preserving compatibility with current industry standards, the circuit is programmed to perform offset auto-calibration automatically after power-up. Each opamp is protected against short-circuits and has its own biasing, calibration DAC and control logic. They share a 10kHz RC oscillator and frequency divider, power-on reset and test mode control logic. Autocalibration is simultaneous on both amplifiers and requires about 250ms. Performance of the op amp is summarized in Table 1, the offset and offset drift distributions are given in Figures 3 and 4. Equivalent noise input and amplification and phase margin variation with frequency are shown in Figures 5 and 6.

Acknowledgments

This work was supported by Texas Instruments. The authors thank F. Sweeney, T. Neale and M. Chiang for support and management, M. Teklu and E. Fretheim for circuit characterisation, P. Deval for technical support and the TLC4502 team for their efforts.

References:

[11 Eschauzier, R. G. H., L. P. T. Kerklan, J. H. Huijslng, "A 100-MHz 100dB Operational Amplifier with Multipath Nested Miller Compensation Structure," IEEE J. Solid-State Circuits, vol. SC-27. pp. 1709-1717, Dec., 1992.

[2] Monticelll, D. M., "A Quad CMOS Single-Supply OP Amp with Rail-to-Rail Output Swing," IEEE J. Solid-State Circuits, vol. SC-21. pp.10261034, Dec., 1986.

[3] Vittoz, E. A.. X. Arreguit, "Linear networks based on transistors," Electron. Lett., vol. 29, pp. 297-298, Feb., 1993.

FIGURES HAVE INTENTIONALLY NOT BEEN INCLUDED

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Appendix H - Request to Combine

On June 26, 2003, Ganesan filed the following Motion to Stay asking the 5th Circuit Court to stay action on three cases he had presented to the U.S. District Court. He requested the 5th Circuit Court delay action until all three had been dealt with fully by that Court.

The first two cases had already been heard by the USDC, and Ganesan had already appealed them to the 5th Circuit (the first case is 5th Cir. No. 03-50193 and the second one is 5th Cir. No 03-50519).

The instant case is the third case and was then in the USDC (USDC No. 02-CV-00753). Ganesan appealed it to the 5th Cir, No. 03-51120, but both Motion for Certificate of Appealability and Motion for Rehearing of same were denied.

In the interests of judicial efficiency and in accordance with Supreme Court Rules, Rule 27.3, Ganesan requests the Supreme Court consider hearing the first two, and perhaps all three, together. Writ of Certiorari for the first case was mailed March 24, 2004 (S.Ct. Case No. 03-1383) and a Writ of Certiorari for the second case is in preparation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-50193

No. 03-50519

APPARAJAN GANESAN
Plaintiff - Appellant

v.

SUDHA VALLABHANENI; BUREAU OF
IMMIGRATION AND CUSTOMS ENFORCEMENT

Defendants - Appellees in 03-50193

U.S. ATTORNEY, U.S. STATE DEPARTMENT,
INTERNAL REVENUE SERVICE; BUREAU OF
IMMIGRATION AND CUSTOMS ENFORCEMENT
Defendants – Appellees in 03-50519

MOTION TO STAY

1. Now comes appellant Apparajan Ganesan and states as follows.

2. Defendant Vallabhaneni fraudulently stopped Ganesan's business payments and this lead directly to Ganesan's bankruptcy. These matters are detailed to this case in plaintiff's Appellate Brief, filed May 12, 2003.

3. Defendant Vallabhaneni falsified declarations to the Bureau of Immigration and Customs Enforcement (at the time, called the Immigration and Naturalization Service), on passport declarations, on Federal tax forms to the Internal Revenue Service (IRS), on California state tax forms, on Texas automobile insurance forms, etc. During a six year period beginning March 1997, Ganesan obtained testimony of an IRS agent under the 100 mile state subpoena rule, met with the full problem solving team of the IRS including its criminal investigation section, and took the deposition of an IRS agent as part of the bankruptcy proceeding. Ganesan had been told repeatedly that he must exhaust his judicial remedies before seeking affirmative action through federal agencies. He did so both through state and federal courts, and he finally filed a Writ of Mandamus in this Cause No (03-50193, USDC No. A:02-CV-00614-JN). The Writ of Mandamus asks the US District Court to order Federal agencies to take affirmative action against Ms. Vallabhaneni.

4. After some consideration, the District Court gave the Wirt of Mandamus a new number (USDC No. 03-CV-00030, Ganesan v. US Attorney, et al) [Attachment 1]. Then, on January 28, 2003, the District Court dismissed 02-CV-00614 (leading to its appeal to this Court). Subsequent to that dismissal, the US Attorney, a defendant in the Writ of Mandamus, used the dismissal of 02-CV-00614 to claim res judicata and preclusion based on that dismissal.

5. Prior to all of the above, beginning in mid 1997, Sudha Vallabhaneni, aided by her attorney Amy Wright, filed in a spurt of malicious charges against plaintiff Ganesan. They convinced Travis County to file six misdemeanor charges and the State to file two felony charges. At jury trial, Ganesan was found not guilty of all misdemeanor charges after 35 minutes of jury deliberation. In a separate jury trial,

Ganesan was found guilty of both felony charges, but one was overturned on appeal by the 3rd Court of Appeals of Texas. See Ganesan v. State 45 S.W.3d 197.

6. The remaining felony charge is on a 2254 petition, filed Nov. 27, 2002, in the US District Court, Western District of Texas (Case No. 02-CV-00753, Ganesan v. Cockrell). In this civil action, Ganesan demonstrates fundamental unfairness in his original trial and the infringement of important Constitutional rights. Ganesan expects a writ to issue as a matter of law, and he filed a rebuttal on April 7, 2003. He is awaiting a ruling. In the absence of a writ, Ganesan would likely file an appeal on 02-CV-00753 to the 5th Circuit.

7. All three civil cases (02-CV-00614, 02-CV-00753, and 03-CV-00030) primarily involve issues between Ganesan and Vallabhaneni, and these issues are "inextricably intertwined." Therefore, Ganesan believes that the interests of justice would best be served if all three cases were simultaneously reviewed by this Court. Such a review might also result in substantial judicial economy.

Relief Sought

8. Ganesan requests a stay in the two 5th Circuit cases until the US District Court rules on 02-CV-00753 and all relevant pleadings are filed. He requests the 5th Circuit review the cases together (two if the District Court rules in his favor 0n 02-CV-00753, all three otherwise)

9.

5th Circuit No	USDC No.	Parties
03-50193	02-CV-00614	Ganesan v. Vallabhaneni and Bureau of

		Immigration and Customs Enforcement
03-50519	03-CV-00030	Ganesan v. US Attorney, US State Department, Internal Revenue Service and Bureau of Immigration and Customs Enforcement
None yet	02-CV-00753	Ganesan v. Cockrell

Ganesan is not necessarily seeking a merger of the cases; he seeks only that they be reviewed together so that justice can be done.

Respectively Submitted,

Signed by:// Apparajan Ganesan
Apparajan Ganesan, Pro Se
TDC 904088

Address of Appellant:

Apparajan Ganesan
TDC #904088
Sander Estes Unit
1100 Hwy 1807
Venus, TX 76084

Note: Subsequent to this motion, in Paragraph 9, the third case became 03-51120, Ganesan v. Dretke

CERTIFICATE OF SERVICE

I certify that the above was been placed in the US Postal Service mail system to recipients at the addresses below on this __26th__ day of _June______, 2003.

Signed by:// Apparajan Ganesan
Apparajan Ganesan
TDC 904088

Address of Appellant:
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Appendix I – Acknowledgment

Thanks to my parents and my Professor M. Anthony Redy who taught me to stand up for what I believe in against all odds.

To Lord Vishnu for his promise to protect his believers against injustice. “Parithranaya sadhunam” – Vishnu Sahasranamam.

To my friend Pam Kwong and Jon Fischer who alerted me to the ineffectiveness of my counsel shortly after my trial.

To my friends Karen Hill, Jon Alvis, Chipp Kidd and the auctioneer’s wife who testified on my behalf to counter prosecutor’s conjectures of “bad character.”

To the many attorneys who were shocked at what happened to me and egged me on to fight for justice.

To my friend Doug Marsh who has believed in me and but for whom this litigation would not have been possible.